REPORTS OF CASES

ADJUDGED IN THE

COURT OF ERROR AND APPEAL.

BY

ALEXANDER GRANT,

BARRISTER-AT-LAW.

VOL. II.

TORONTO:
HENRY ROWSELL,
1866.

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1846
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REPORTS OF CASES

IN THE

COURT OF ERROR AND APPEAL.

[*Before the Hon. Sir J. B. Robinson, Bart., Chief Justice; the Hon. W. H. Draper, C. B., C. J., C. P.; the Hon. Vice-Chancellor Esten; the Hon. Mr. Justice Burns; the Hon. Vice-Chancellor Spragge; the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.*]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

Between JAMES A. HENDERSON, HENRY SMITH, *the younger*, DANIEL BRYANT, GEORGE BRYANT, JAMES BRYANT, CHARLES EDWARD CLARK, JOHN RICHARD CLARK, WESLEY MCRORY, JOHN MCRORY, LEWIS BARCLAY, *and* JAMES GRAVES, *Appellants, and* GEORGE OLIVER GRAVES, *Respondent.*

1862.
24 June, 1861, and 26 June, 1862.

Attorney and client—Trustee and cestui que trust—Constructive notice—Purchase for value without notice.

An attorney in the prosecution of suits to recover an estate for the heir-at-law, who is supposed to be A., buys in a paramount title for the heir-at-law, and subsequently conveys the estate to A., the supposed heir, who sells and conveys to divers purchasers. On a bill filed by B., the real heir, against the attorney and A., and the purchasers from them, the court—in this respect affirming the decree below, as reported in 6 Grant, p. 306—adjudged them to be trustees for B., although it appeared that the ancestor had long before his death conveyed away all his interest in the lands for value—[Sir J. B. ROBINSON, Bart., C. J., dissenting,]—but some of such

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purchasers having had a prior or better equity than the plaintiff, the court—varying the decree of the court below in this respect—directed that they should not be disturbed although they got in the legal estate with constructive notice of the opposing claim; [ESTEN, V. C., dissenting;] and also varied the decree as to the other purchasers, by directing that under the circumstances the account of rents and profits against them should be limited to commence from the filing of the bill, and that they should be allowed the fair value of all substantial repairs and permanent improvements made by them prior to that date.—[ESTEN, V. C., *dubitante*]

The doctrine of constructive notice, and the defence of purchase for value, as applicable to this country, commented upon.

This was an appeal from the decree of the Court of Chancery, as reported in the sixth volume of the reports of that court, at page 306, by the defendants in the cause, who assigned as reasons for such appeal:

1. Because Captain *Adam Graves*, the respondent's ancestor, did not die seised of the said lands, or any of them.

Statement.

2. Because the respondent never had any estate or interest in the said lands, which could in any way entitle him to institute or maintain a suit in the Court of Chancery in respect thereof.

3. Because Messrs. *Smith & Henderson* were never retained or instructed by, or on behalf of the respondent.

4. Because the title acquired by *Henry Smith*, and conveyed by him to *James Graves*, was a title wholly independent of the respondent, and not purchased with his money.

5. Because no title or interest in the said lands passed to the said *Henry Smith*, by the said deed from *T. H. Bridge*, inasmuch as all the estate and interest of the said *T. H. Bridge* in the said lands, had, before the date and execution of that deed, passed to the said *T. H. Bridge's* assignee in bankruptcy, under the statutes in that behalf.

6. Because as to the appellants, the *Clarks* and others,

they were *bona fide* purchasers for valuable consideration, without notice of the alleged trust: and as such are entitled to the protection of the registry laws as well as the rules of equity in favour of such purchasers.

7. Because as to the *Bryants* they were equitably entitled to the lands conveyed to them, under the said lease and contract for sale therein contained.

8. Because as to the *Bryants* they had the prior and the better equity.

9. Because the said respondent ought to have been left to his remedy, if any, at law, the same not having been impaired by the appellants.

10. Because the said decree doth not direct any allowance to be made to the appellants for their improvements upon the said lands.

Statement.

11. Because the said decree ought not to have charged the said appellants with any rents or profits whatever; or at all events, for any time anterior to the filing of the said respondent's bill in the Court of Chancery against the appellants.

12. Because as to the *Clarks* they had been in possession of their lands for upwards of twenty years before the filing of the respondent's said bill.

13. Because the said decree should have ordered the dismissal of the said respondent's bill with costs.

In support of the decree the respondent assigned the following reasons:

1. The property in question was vested in the defendant, *Henry Smith*, in trust for the respondent, and the other appellants are not, nor is any of them, entitled to protection as purchasers for value without notice.

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2. The respondent is *cestui que* trust of the property, and none of the appellants has a better equity.

3. Messrs. *Smith* and *Henderson* accepted retainer on behalf of the respondent, and, by the subsequent ratification and adoption of that retainer, their liability to him was the same as if they had been originally retained by him.

4. The title conveyed to *Henry Smith* was so conveyed in trust for the respondent, and the other appellants had each of them notice of the trust before they paid the whole of their purchase money and perfected their legal title to the property.

5. The appellant did not, in the pleadings, set up the case relied upon in their fifth reason of appeal, and ought not to be allowed to set up such a case without pleading it.

Statement.

6. The alleged agreement set up by the *Bryants* does not amount to a defence by them, as they did not complete their purchase within the time in that behalf limited.

7. The *Bryants* abandoned the contract referred to in the seventh reason of appeal.

Mr. *Crickmore* for the *Bryants*, *McRorys* and *Barclay*.

Mr. *A. Crooks* for the *Clarks*.

Mr. *Hodgins* for *Smith*, *Henderson* and *James Graves*.

Mr. *Roaf*, for the respondent.

The judgment of the court was delivered by

BURNS, J.—The case may be divided in this manner as subject matters of consideration, first, as respects the

plaintiff's claim against the solicitors, Messrs. *Smith & Henderson*, and the defendant *James Graves;* and secondly, as against all the other defendants who became purchasers either from *James Graves* or from Messrs. *Smith & Henderson*.

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I see no room to doubt that Messrs. *Smith & Henderson* must be considered as having originally been the attorneys and solicitors of the present plaintiff, and whom they thought to be alive. This commenced in the year 1846, and continued on until 1849, when several actions of ejectment were brought in the plaintiff's name against those in possession, but more particularly the *Bryants*. While these actions were pending, and on the 3rd of July, 1849, Mr. *Smith* procured the conveyance to himself from *Thos. H. Bridge*, the heir-at-law of *Samuel S. Bridge*, in whom was vested the legal estate of the lands in question; as we have every right to assume for the purpose of a decision of the present case. The consideration paid by Mr. *Smith*, and which was from his own funds, for this transfer was £25; but it is evident that the purchase was not for himself, or on his own account, for he says in his evidence: "I stated to Mr. *Bridge* that I had been employed to bring actions for the property: that I had discovered that he had a title, and if he conveyed it to me, I would convey it to the heir." And again: "I thought it best to compound and buy up this title, which I did." The trial of the suit in the plaintiff's name against the *Bryants* took place in September, 1849. Mr. *Smith* states that he was not aware at that time that *Bridge's* transfer to him was a complete transfer of the legal estate, and that he did not become aware the fact was so, until after he had settled matters with *James Graves*, and in the year 1853, when the discovery was made by finding the notarial deed or conveyance from Captain *Adam Graves* to *Doty*. The fact that Mr. *Smith* did not know he had acquired the legal estate, can make no difference in his fiduciary relation, and the

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question is, what was that at that time. He certainly was acting on behalf of and for the heir of Captain *Adam Graves*, and that heir he then supposed and believed to be the present plaintiff, whom he supposed to be alive. In this state of things the trial took place against the *Bryants*, and the defendants succeeded on the ground of the presumption that the plaintiff was not then living, in consequence of long absence without being heard of.

Mr. *Smith* then applied to a sister of the plaintiff and of *James Graves*, to obtain instructions from *James Graves*, whom he assumed to be the then heir of the property. An action was again commenced upon the several demises of the plaintiff and *James Graves* against the *Bryants*, and other actions in a similar manner against other parties. *James Graves* came from Lower Canada in 1850, and on the 14th of October, 1850, Mr. *Smith* conveyed to him the whole of the lands except lot 18, in the 3rd concession, and except what had been sold for taxes. No doubt at that time Mr. *Smith* was acting as the solicitor of *James Graves*, and, as we must suppose, doing so under the *bonâ fide* belief that the present plaintiff was dead.

Judgment.

Mr. *Henderson*, in his evidence, says: "We should have conveyed to *George Graves* instead of *James*, because we were bound, as I conceive, to convey to the person entitled as heir of Captain *Adam Graves*." Suppose the present plaintiff had come to Canada at any time before Mr. *Smith* conveyed the estate to *James Graves*, and had claimed the services of Messrs. *Smith & Henderson* as his solicitors, on the footing that they were instructed to act in his behalf by his mother and sister; and as Mr. *Smith* says, that "*James Graves* acted as the agent of his brother, after Mrs. *Graves's* death," can any one doubt that it would have been legally adjudged that they stood in that fiduciary relation, notwithstanding Mr. *Smith* does say that he never

saw or had any communication with the plaintiff until long after the conveyance made to *James Graves?* And can any one doubt, after reading the answers and evidence of Messrs. *Smith & Henderson*, that if the plaintiff had so come to this country, that they would not voluntarily have transferred the estate so acquired to the plaintiff? I feel quite sure that they would neither have denied their position to him, nor would they have denied his right to claim the property. Then if that be so, does the fact that Messrs. *Smith & Henderson* became the solicitors of *James Graves*, under the belief that the plaintiff was dead, and acting upon that belief, having conveyed the estate to *James*, absolve them from accountability to the plaintiff? Looking at the facts and circumstances of this case, I do not think they have any right to claim such an exemption.

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In *Kelsall* v. *Bennett*, (*a*) Lord *Hardwicke* held a plea of being a purchaser for valuable consideration without notice bad, under the following circumstances: A. being possessed of property in England, made his will, and devised to B. in tail, and in the event of that failing, then over to C. in fee. B. was living in Virginia, and he died there, but left a son. C. supposing that the estate tail was exhausted, sold the estate to D., and furnished him with an affidavit of the death of B. without issue. When B.'s son afterwards filed a bill for a discovery of the title deeds and possession of the estate, D. answered he was a purchaser for value without notice; but it was held no defence, for inasmuch as he derived title also under the same will, it was his duty to see that the estate tail was exhausted, and that under the circumstances the denial was not a denial of title, but a denial of the person in whom the estate was, and that would not do. Now, so here in this case, Messrs. *Smith & Henderson* do not, and cannot deny that at one time the plaintiff had a right in equity to the equitable interest

Judgment.

(*a*) 1 Atk. 522.

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in this property, but they set up as an answer to the plaintiff's claim, that they have accounted to another person, whom they thought to be the heir of Captain *Adam Graves*, under the belief that the plaintiff was dead, but that amounts to this, that they in fact have accounted to the wrong person.

The presumption which enabled the *Bryants* to defeat the action in ejectment, [illegible] the circumstances of this case, was not a sufficient warrant for Mr. *Smith* in disregarding the plaintiff's rights, and for all we see, he seems to have acted upon that, and, as he says, that Miss *Graves* introduced *James* as the heir. It is true Mrs. *Graves* in her letter to Mr. *Smith* of the 8th of February, 1847, stated that she had not heard from her eldest son (the plaintiff) for many years, and for any thing she knew to the contrary might not then even be in existence; but yet we see that the plaintiff's sister had a letter from him dated at York, in England, on the 12th of April, 1843. Mr. *Smith* refers to this letter in his when writing to the sister on the 22nd of September, 1849, and in his evidence he says he went to Miss *Graves* to get evidence to prove that the plaintiff was alive, and that she shewed him the outside of the letter holding it at a little distance, but refused to let him see the contents. It is difficult to conceive what her object was in such conduct, but whatever it may have been, there was information which should have put Mr. *Smith* upon enquiry in respect of the matter before he finally parted with the legal estate, which he had acquired in his fiduciary character. Mr. *Smith* too easily, as between the brothers, assumed the death of the plaintiff, for though the absence of the plaintiff, without being heard of, might be sufficient to justify a jury in defeating an action of ejectment which concludes not the right of any one, yet when Mr. *Smith* was aware that the sister had heard from him, and further, as he states, that this *James Graves* was acting as an agent for the plaintiff after his

Judgment.

mother's death, there was reason for pausing and making himself more thoroughly acquainted with the truth of the matter. 1862. Henderson v. Graves.

The defendant *James Graves* gave no consideration for the transfer to him; he knew the facts under which he acquired the property, and no reason whatever exists to excuse him from accountability, and from transferring such part of the estate as is vested in him to the plaintiff.

With respect to all the other defendants, the decree of the court below compelling them to re-convey such parts of the estate as they respectively have become possessed of, is based, as I understand it, upon two propositions, one of which is, that some of the defendants have not as yet paid all their purchase money, and so are not in a situation to claim the position of purchasers for valuable consideration, paid before notice of the plaintiff's equitable claim; and next, that some of the defendants having employed Messrs. *Smith & Henderson* to prepare the conveyances to them from *James Graves*, and from Mr. *Henderson*, to whom portions of the estate had been conveyed, they must be considered as having constructively notice of all such facts as Messrs. *Smith & Henderson* themselves had knowledge of, and so are disabled from setting up such defence. The principles as enunciated of course are correct, but the question in the present case is, how far they apply to the facts of the case we have to deal with. Judgment.

Before entering upon the facts, as respects the defendants who have become purchasers, I think it right to make some observations upon the doctrine of constructive notice through agents, as applied to the business transactions of this country. I do not feel disposed to carry the English doctrine an iota further than as laid down in such cases, as we must suppose people here either are or ought to be acquainted with, and upon

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equitable ideas, as applied to the mode of doing business in this country, will produce both an equitable and just decision and disposition of property. We all very well know that in former years probably three-fourths of the conveyancing in the province was done by school-masters, surveyors, and other non-professional agents, and a very large proportion of it is still done in that manner. Further than that, we know it to be the fact, that in numberless instances the parties themselves have prepared their own conveyances, frequently the vendor prepares the deed, and the purchaser will perhaps search the registry, or he takes a certificate of the registrar, obtained at the instance of the vendor. Beside these considerations, the general introduction in this country of the registration of titles has so far simplified the investigation of titles that many persons search the registry for themselves, without the aid of any professional gentleman, and inasmuch as we know it judicially to be the fact, that both professional and non-professional persons rely much, and in very many instances entirely, upon what the registry discloses, there is no such necessity for each party in dealing with the other to employ different solicitors, as there is in England.

Judgment.

I should say, from the more recent cases in England, a disposition is manifested rather to curtail than extend the doctrine of constructive notice. Vice-Chancellor *Kindersley*, in *Espin* v. *Pemberton*, (*a*) says: "Now from the case of *Hewitt* v. *Loosemore*, which has been referred to, it appears that the Lords Justices had come to a similar decision in a former case, and I confess I am bound to state that if it were not for that opinion I doubt whether I should arrive at the same conclusion. If I consider many cases which might occur, I cannot see the reason for concluding that because the mortgagor is a solicitor, he is necessarily the solicitor of the mortgagee. The mortgagee may himself be a solicitor or a barrister, and not choose to employ any other solicitor;

(*a*) 4 Drew. 333.

and it would be a hardship upon him to say that because the mortgagor is a solicitor he is therefore to be treated as the mortgagee's solicitor." In the same case, upon appeal, before Lord *Chelmsford*, (*a*) the Lord Chancellor, though approving of *Hewitt* v. *Loosemore*, yet says: "I find it very difficult to accede to the proposition, however high may be the authority from which it proceeds, that where a mortgagor is himself a solicitor and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be agent or solicitor of the mortgagee in the transaction. I think there ought to be some consent on the part of the mortgagee to constitute this relation between them."

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There is one proposition which should not be overlooked in dealing with those parties who purchased, and to which, perhaps due weight was not attached, and it is this, that up to the time of the answers of the defendants Messrs. *Smith & Henderson*, to the first bill filed in this matter on 25th of August, 1856, and the evidence taken upon it on the 31st October, 1856, there was nothing whatever in writing in any way upon which the court could enforce a trust for the heir of Captain *Adam Graves*. It is true that in 1850 Mr. *Smith* conveyed to the defendant *James Graves* all the land, with the exception of one lot, and as to that lot he took a conveyance to himself, and, as we can readily suppose and believe, this was done on the supposition that *James Graves* was the heir; but there is nothing on the face of the deeds which would shew such to any purchasers to have been the case. Every thing, so far as the evidence discloses, rested in parol until Messrs. *Smith & Henderson* put in their answers. Mr. *Smith* had answered the first bill, altogether denying his character of trustee, and alleging and claiming that he had bought the estate from *Bridge* on his own account, and with his own money. I am not prepared to say that it might not have afforded

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(*a*) 3 DeG. & Jones, 547.

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a complete defence to all the defendants, with the exception of Messrs. *Smith & Henderson*, and *James Graves*, so far as the question of the legal estate was concerned, leaving the court to deal with the securities, but with respect to some of them I should have no doubt. I am saying this upon such evidence as is afforded in this case; but Messrs. *Smith & Henderson* have never denied their position, as being trustees for some one, and the true question now is how far that now attaches upon the other defendants.

I will take up the case of the *Bryants* first. It is not denied in evidence they had a lease for that portion of the estate in their possession for twelve years from the 1st of May, 1841, with the right to purchase within that period from *Bridge*, who now is admitted to have been the true owner of the estate. Mr. *Smith's* purchase was therefore subject to that right, and he was aware the *Bryants* were in possession, and that they claimed such right when he acquired the estate. The action of ejectment against them failed upon the ground of the presumption of the plaintiff's death. The decree against them proceeds upon the double ground that at the time of the filing of the plaintiff's bill they had not paid up their purchase money in full, and besides had bought the estate after the expiration of the time allowed them to do so, and therefore were in no situation to resist the plaintiff's claim. The latter ground is founded upon a mistake, as it was supposed they had only nine years in which to purchase, whereas they had twelve years to do so. They had succeeded in the ejectment suit on the ground of the supposed death of the plaintiff, and immediately after, namely, on the 2nd of November, 1849, they applied through their own solicitor to *James Graves* to purchase. Of course we must suppose that was done without any idea that in point of fact Mr. *Smith* was the person at that time who could have transferred to them the legal estate.

Judgment.

The purchase was completed on the 18th of October,

1850, and the legal estate transferred to them by *James Graves*, he having a few days before received it by conveyance from Mr. *Smith*. It is very true the *Bryants* have not paid up their purchase money in full; but the question is, whether there was any necessity that it should be done in their case to enable them to contest the plaintiff's right. It now turns out that they do not at all derive title through the heir of Captain *Adam Graves*, and if they had done so it is equally clear that such heir, namely, the plaintiff, would have been equally bound to have performed the contract of purchase which the *Bryants* held, if they had exercised the option of purchase. No doubt they thought they were purchasing from the heir, irrespective of their contract at the time they made the bargain, but the question now is, whether they are not in a position to set up the legal claim of title to them, in opposition to the plaintiff's equitable claim. The plaintiff would be bound by the contract which the *Bryants* held, and they have purchased from the right person to give them the title, though from the wrong person to have received the money. They did not know the latter at the time, and had no reason to know that Mr. *Smith* had bought up the legal estate as trustee, at least there is no evidence that they knew or had reason to know that fact. The deeds from *Bridge* to Mr. *Smith*, and from him to *James Graves*, do not disclose that Mr. *Smith* was but a trustee, and there is not a tittle of evidence to shew that Mr. *Smith's* position was communicated to them in any way; and it now turns out that in equity the *Bryants* were entitled to the land if they exercised the option of buying, and this option they did exercise; and therefore I think the doctrine of payment of the purchase in full before notice is not applicable to their case. The fact that the *Bryants* did not pay money down, as their contract would imply should have been the terms of purchase, I do not think should militate against them under the circumstances of the case. They bought in 1850 on terms somewhat varied from that of paying

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Judgment.

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money down; but had they not bought during the twelve years, they would have had no right after to do so. The plaintiff has never had any thing more as against them than an equitable right, and in my opinion he has no more equitable right to the legal estate itself than the *Bryants* have, and they ought to be allowed to retain it. The question, I think, with regard to them, is confined to the title to the purchase money. The *Bryants*, as it appears to me, have acted in good faith, and ought not to be subject to pay again what they have paid, and I think the plaintiff's bill as against them should be dismissed with costs.

Judgment.

The only thing which can be urged against them by the plaintiff is this, that before he should be concluded as to them, whether the court would order an enquiry, that is to say, whether they purchased under such circumstances, that is, from *James Graves* as to terms of payment and price, that the plaintiff should be held bound. We must remember that their right to purchase was altogether paramount to any right the plaintiff acquired. The plaintiff had no right whatever to the property except such as he obtained through Mr. *Smith*, having bought as his solicitor, to all of which the *Bryants* were strangers. The *Bryants* set out in their answer the manner in which they claimed the right to hold the property, and which was, that having the agreement to sell to them, and the legal title coming to *James Graves*, they completed the purchase. The plaintiff was apprised of this by their answer; but instead of admitting the truth of the *Bryants* holding an agreement from the person who at the time held the legal estate, and could transfer it to them, and amending his bill thereupon, and asking an enquiry upon the subject, he traverses their answer, and puts them to prove it. They have proved it, and after that I think it would be too much to direct an enquiry into circumstances with a view of ascertaining whether the plaintiff is to be bound by a contract undoubtedly made with a person, that is

Bridge, who could have given them both the equitable and legal title, and afterwards completed with the person who could transfer them the legal estate. The plaintiff could have raised such an issue as to them if he had thought proper, but he did not.

With respect to the purchase money, it appears that *James Graves* received £25, and Messrs. *Smith & Henderson* the residue, except the last payment of £27 10s., and for which they hold an assignment of the mortgage given by the *Bryants*. The purchase money so received can be dealt with in the accounts to be taken.

The case of the *Clarks* comes next in order. They purchased from *James Graves*, and obtained conveyveyances on the 18th of October, 1850. *John Richard Clark* has paid the mortgage he gave in full, without any notice of the plaintiff's equitable claim, unless he is to be held to have had constructive notice in consequence of Messrs. *Smith & Henderson*, having prepared the conveyance and the security. It appears that actions of ejectment were commenced in the plaintiff's name, and also on the demise of *James Graves*, against both the *Clarks*, but it is not clear that they were served with the declarations; and if they had been served, they would have derived the information that *James Graves* claimed as heir as well as this plaintiff, for the declarations contained the double demise. But Mr. *Smith* says in his evidence he does not think the declaration in ejectment was served on the *Clarks*. It seems they spoke to Mr. *Smith* about buying, who introduced *James Graves* as the heir; and they consulted the same solicitor whom the *Bryants* had, and who recommended them to buy from *James Graves*.

Judgment.

So far indeed as any information that *Clark* could have obtained from the solicitor of the *Bryants* to affect his position, it is not pretended that he knew of Mr.

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Smith's position as a trustee in any way. The question they were seeking information upon was, whether *James Graves* was the proper person to purchase from. No one at that time knew that Mr. *Smith* was only a trustee for the heir of Captain *Adam Graves*, neither *Bryant's* solicitor nor any one else, and it seems that *James Graves* held then the legal estate quite irrespective of his being the heir.. Relying upon what Mr. *Smith* told them as to *James Graves* being the heir, and upon the information they had from the solicitor they consulted, they bought. Mr. *Henderson* swears that Messrs. *Smith & Henderson* were not solicitors for the *Clarks*, and therefore it is reduced to the mere fact of their having prepared the conveyances and the *Clarks* paying them, to establish constructive notice. I shall never bring my mind to think that so meagre an act as that shall cause a person the forfeiture of an estate, and to assume that it was the duty of Messrs. *Smith & Henderson* to have informed the *Clarks* that Mr. *Smith* was only a trustee himself, having bought the estate for the benefit of the heir of Captain *Adam Graves*. Therefore as *John Richard Clark* has paid all of the purchase money he was to pay before he had notice of the plaintiff's equitable claim, he should, I think, be free.

Judgment.

With respect to the other *Clark*, he has not yet paid up the mortgage which he gave to secure the purchase money, and as to him, I feel myself compelled to say, I think he must hold subject to the plaintiff's claim. The question with respect to him is, under what circumstances a person may be considered as a purchaser for valuable consideration without notice. It has been held in the American courts that a purchaser giving promissory notes negotiable, which may find their way into other than the vendor's hands, and so the purchaser lose both money and land, he may be considered as such purchaser, the vendor having taken money's worth for the land. But here *Charles Clark* immediately reconveyed the

land to *James Graves* again, to secure the purchase money. The transaction is therefore not closed. The money appears to have been past due when suit brought. The money remains to be paid on the one side; and on the other, there must be either a release of the estate given, or a certificate registered under the statute, in order to re-vest the legal estate in *Charles Clark*. We cannot admit that he shall be protected *pro tanto* for such payments as he may have made without notice of plaintiff's claim, and compel the plaintiff to accept the residue unpaid of the purchase money, for independent of other considerations, that would amount to saying, that under the circumstances of this case, either that *James Graves* holding the legal estate, had an equitable right to dispose of the plaintiff's equitable interest, and a right to take a security for the purchase money, or that notwithstanding it is admitted that *Clark* has not yet paid, that he may be excused giving up the estate conveyed to him under the circumstances of this case. No English or American decision supports such a proposition, though it is quite true that new decisions must constantly take place whenever a new state of facts occurs calling for the establishment of what, perhaps, at first sight appear to be new principles.

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Judgment.

As to all the other defendants, they stand precisely in the same situation as *Charles Clark*. But with respect to them, there is this consideration, which in a case like this ought not to be overlooked, viz.: that in and after October, 1850, they acquired the legal estate and thought they were the true owners without being affected by any trust, which would deprive them of that. They were making improvements upon the property, without supposing the plaintiff had any right to enjoy the fruits of their labour. The plaintiff himself had no idea for years that he had any claim, and in truth he had none until Mr. *Smith* purchased on the 3rd of July, 1849. Even then the plaintiff, and for some years after, did not

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know that he had any right to the property. It is not certain at what time he came to this country, or that the defendants became acquainted with his equitable interest. The question is, as to these defendants, what rents and profits they should be accountable for, and whether the plaintff should, under the circumstances, be accountable for any substantial improvements.

Under all the circumstances of this case I think the decree should be varied in this manner. As to the *Bryants* and *John A. Clark* the plaintiff's bill should be dismissed with costs. As to the defendants *McRory* and *Charles Clark*, the account of the rents and profits should be confined to commence at the date of filing the plaintiff's bill, and as to them it should be referred to the master to take an account of the fair value at the time of the taking such account of all such substantial and permanent repairs and improvements made by any of the defendants anterior to the filing of the plaintiff's bill, and that the plaintiff be charged therewith. That the defendants Messrs. *Smith & Henderson* should be declared entitled to be re-paid the £25 paid by them for getting in the title from *Bridge*, with interest thereon from the time it was paid; also, that an account should be taken of all their expenses in and about the business of the plaintiff, together with their costs of the ejectment suits brought by them to assert the plaintiff's title to the premises, and that they should account for what money they or either of them have or hath received from the *Bryants* and *John R. Clark* on account of their respective purchase moneys, and if it shall appear that the *Bryants* have not as yet paid the residue of their purchase money, then they shall assign the security held by them for the same to the plaintiff: and as to *James Graves*, that he should account to the plaintiff for so much of the purchase money as he may have received from the *Bryants* and from *John R. Clark*. As to the costs and all further directions, they should be reserved until after the master has made his report.

Judgment.

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SIR J. B. ROBINSON, BART., C. J.—It appears from the evidence that Mr. *Smith*, now Sir *Henry Smith*, one of the defendants, a partner in the firm of *Smith & Henderson*, attorneys, having been informed that there were persons occupying this property, or small parts of it, without title, and having heard that the heir of *Adam Graves*, to whom the Crown had granted the land in 1797 by patent, was supposed to be the real owner, he did either of his own accord, or at the suggestion of one *George Graves*, a relation of the family, formerly living in Pittsburg, near Kingston, but now deceased, make enquiry of the family of *Graves*, still living at Sorel, in Lower Canada, (where the patentee *Adam Graves* had lived and died,) in order to find in whom the title was vested.

He was led, it seems, to believe from what he then heard in 1846, from Mrs. *Agnes Graves*, the mother of the plaintiff, that her eldest son, the now plaintiff, whose father, *George Graves*, then deceased, was the eldest son and heir-at-law of the patentee Captain *Adam Graves*, must, from all that appeared, be the legal owner of this property, if he was living, but that he had been more than twenty years absent from Canada, and that it was uncertain at the time of the enquiry whether he was alive or not.

Judgment.

It is fair to consider that the object of Mr. *Smith* was not merely to ascertain who was the heir in a general sense to *Adam Graves*, the patentee, but rather to find, if he could, who the person was that inherited this land. If Mr. *Smith* had been told that this plaintiff, if living, was the lineal heir of *Adam Graves*, but that he could have no claim to this land in Pittsburg, because his grandfather *Adam Graves* had sold and conveyed it away in his life-time, we cannot suppose that he would have volunteered to act as attorney for this plaintiff in endeavouring to recover the land in his name by actions of ejectment.

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It is positively sworn that neither of the defendants *Smith & Henderson*, knew any thing of *Bridge's* claim to the land, when the action was commenced against the *Bryants* in the name of *George Graves*, as lessor of the plaintiff. There was indeed a conveyance upon record in the county registry, from one *Samuel Doty* to one *Samuel Southby Bridge*, ever since the 7th of January, 1836, which I suppose from the evidence was the earliest deed respecting this land to be found in the registry; and so it might have been known by *Smith & Henderson*, if they had searched the registry before they brought the ejectment, that *Samuel S. Bridge* pretended title to the land. But it is not proved that they had any knowledge of that fact, and they positively deny that they had, until a few months before the action against the *Bryants*, which took place in September, 1849.

Judgment.

I infer from the evidence that that ejectment was brought in *George Graves'* name, under the belief not only that he was the heir of the patentee *Adam Graves*; but also under the belief that his grandfather and father had in succession died seised of the land, not having made any disposition of it by will or otherwise, and that *George Graves*, the now plaintiff, in whose name the ejectment was brought, had become entitled to it as heir.

The evidence shews also, I think, that under that persuasion the defendant *Smith* volunteered without being retained by this plaintiff, whom he made plaintiff in the ejectment, or by any one who had or pretended to have authority to act for him, to commence an ejectment, and to carry it to trial, in order to dispossess the occupant, and that he offered to the plaintiff's mother to conduct the suit at his own expense, without a right to look to any one for his costs; being content to rely upon the expectation that if he gained possession the plaintiff *George Graves*, if he were living, or any one who should inherit from him, if he were dead, would remunerate him satisfactorily

for his services and disbursements, when he should know what had been done, and when he saw that it had opened the way to him to take possession. 1862. Henderson v. Graves.

Of all this it appears that *George Graves*, wherever he was living, knew nothing at the time; and it is therefore clear that if he had returned to Canada while the ejectment was pending, or had otherwise become aware of the use that had been made of his name, he might have disclaimed the whole proceeding, and refused to sanction it. This indeed as an honest man he must have done, if he had known what we now see, and what is not very likely he could have been ignorant of, that he had in fact no claim to the land, because his grandfather had in his life-time conveyed it away in exchange for other lands, which his family had enjoyed till they sold them. There is no doubt that this plaintiff could have refused to pay any portion of the costs of this ejectment that had been brought in his name, without his authority; though I take it to be equally clear that if, while the proceedings were going on, he had in any manner sanctioned or acquiesced in them, the case would be different. But so long as he was wholly ignorant of what had been done, and had in no manner deprived himself of the right to treat it all as unauthorised, *Smith & Henderson* had, I think, as clear a right to decline going on further with the action which they had brought of their own accord, and at their own risk as to costs. Judgment.

As soon as they discovered either that this plaintiff *George Graves* was never seised of the land, or that there was reason on legal principles to presume that he was no longer living, they were at liberty, I think, either for such reason, or indeed without any reason, to drop the proceeding. And if all we knew of the matter was that they had done so, and had commenced another suit at the instance of any one whom they took to be the true owner, then there would have been no pretence for looking upon a fiduciary relation as existing between them

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and this plaintiff, *George Graves*, from whom they had never received any instructions or information, who had never retained them, or knew any thing, as it appears, of their proceeding; and who could not therefore have been said to have reposed a confidence in them which it was in their power to abuse.

But matters did not take that turn. The ejectment against the two *Bryants* upon the demise of the present plaintiff *George Graves* was tried in September, 1849. Before it came on, the defendant Mr. *Smith* had become aware, as he admits, that the *Bryants* claimed under a title from *Samuel S. Bridge*, to whom one *Samuel Doty* had conveyed the land, but he could not find what right *Samuel Doty* had to make the conveyance; no deed from the patentee *Adam Graves* to *Samuel Doty*, or to any one, having then been discovered. Upon reference to the plaintiff's mother, Mr. *Smith* found, as he states, that she either did not know, or pretended not to know, that the plaintiff's grandfather *Adam Graves* had ever disposed of the land in Pittsburg. Not knowing, as he swears, whether *Adam Graves* had ever made a conveyance of the land, or had only agreed to sell it for some consideration which he had, or had not received, he went on with the action against the *Bryants*. Before the trial, however, he hunted up the heir of *Samuel S. Bridge*, who it seems had died, namely, his son *Thomas H. Bridge*, and got from him, as he admits, *for the heir of Adam Graves*, a release of all his right to the land for a very trifling consideration, telling *Bridge* that it was for *Adam Graves' heir* that he was buying up the claim, though nothing of that kind was expressed in the deed, which was a release in fee to the defendant *Smith*.

Judgment.

This release or quit-claim he states *Thomas H. Bridge* gave him for the small sum of £25, being content to do so, because the title was imperfect, there being no conveyance to shew from *Adam Graves;* and also

because he *Thomas H. Bridge* had, since his father's death, become bankrupt, and all his property real and personal was vested in his assignees, so that he had no real interest in the land.

We have no other account of this part of the transaction, and there is documentary evidence confirming this statement.

Then it appears that some time before the trial, (whether before or after the 3rd of July, 1849, when the release or quit-claim was obtained from *Thomas Bridge*, I do not make out from the evidence,) Mr. *Smith* went to Sorel for the purpose of obtaining proof that *George Graves*, in whose name the action was going on, and who had then been absent, it seems, from Canada nearly 29 years, had been heard of within seven years. This, I suppose, it was thought necessary to learn, upon the principles on which Doe dem. *Knight* v. *Nepean* (*a*) was determined, in order that the plaintiff's counsel might be prepared to rebut any evidence that the defendants might attempt to give that nothing had been heard of *George Graves* (the plaintiff in the ejectment) within seven years. We are told by the defendant Mr. *Smith*, that the mother or sister of *George Graves*, either could not, or would not put it in his power to give any such evidence, and that the action of ejectment in consequence failed at the trial.

Judgment.

It is not explained, and it is not material for us now to know, whether on the defence any evidence was given to prove that more than seven years had elapsed since the plaintiff, who had been so long beyond seas, had been heard of; or whether the plaintiff or the learned judge at the trial assumed, which I think would have been erroneous, that proof of the plaintiff being alive within seven years formed a necessary part of the plaintiff's case in the first instance.

(*a*) 2 M. & W. 894.

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The defendants, it is merely stated, succeeded, because no such evidence was given; and *Smith & Henderson* brought an action subsequently against the *Bryants* upon the joint demise of the plaintiff *George Graves*, and his next brother *James Graves*. It was prudent to proceed upon this demise of the two, or on a double demise, and not to drop *George Graves* as lessor of the plaintiff, for otherwise if the action had been on a demise by *James* alone, as heir of *George*, the case must have failed if it could have been shewn at the trial that *George Graves* was in fact living.

The reason given for persevering in attempting to recover for the heir of *Adam Graves*, notwithstanding what had been heard of the deed made to *Samuel S. Bridge* by *Samuel Doty* is, that Messrs. *Smith & Henderson* were unable to prove that *Adam Graves* had ever conveyed to *Doty*, who made that deed.

Judgment.

Several ejectments, it seems, were brought against other occupants of these lands in 1850, by defendants *Smith & Henderson*, on the demise of *George* and *James Graves*, but no trials were had of any of them for the reason, according to the evidence, that from the event of the trial in 1849, and from what the defendants in the different cases had heard from Messrs. *Smith & Henderson*, and from other counsel, as well as from *James Graves*, they were satisfied that he, *James Graves*, was the heir, on account of the presumption, not disproved, of *George's* death; and upon the further understanding that *James Graves'* title had been, or would be, fortified by a transfer to him of whatever interest could have passed under the release taken by the defendant *Smith* from *Thomas H. Bridge*, they were content to purchase from *James Graves*, and in that manner the several cases were compromised.

Two or three years after this, it appears a deed was found in Montreal, bywhich the patentee, *Adam Graves*,

had sold and conveyed to the Rev. *John Doty*, of Sorel, in 1801, lots 17 and 18 in the first and second concessions of Pittsburgh, 800 acres, in consideration of lands in the parish of Sorel, which were conveyed to *Adam Graves* by Mr. *Doty*, in exchange. And thus it became clear that the plaintiff in the suit now before us, *George O. Graves*, never had been seised of any interest legal or equitable in those lands in Pittsburgh by inheritance from his father, to whom they had not descended, and it has not been pretended that he had any other claim to them.

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About three or four years after the settlement made with the several occupants of the land, by their taking title from *James Graves*, the plaintiff *George Graves*, it seems, came out from England. He had been living in Yorkshire, though for how long a period does not appear, and had written from thence a letter to his mother Mrs. *Agnes Graves*, then living at Sorel. This letter is in evidence in this cause, and is dated the 12th of April, 1843. If it had been produced and proved at the trial of the ejectment in September, 1859, it would have shewn that he was living a few months within seven years of the time when he was presumed by the jury to be dead. Mrs. and Miss *Graves* (a sister of this plaintiff) must have been able to prove the fact at the trial, if indeed Mrs. *Graves* was at that time living; and I should find it difficult to persuade myself that Mrs. and Miss *Graves* and *James Graves* were not all aware of the transaction between Captain *Adam Graves* and the Rev. *John Doty*, by which the land in Pittsburgh, or at least 800 acres of it, had passed out of their family for a good consideration. If they did know it, and gave no intimation of the fact to *Smith & Henderson*, they certainly acted disingenuously, and if the fact had been that any thing had passed between them and *Smith & Henderson*, or either of them, which could be reasonably looked upon as a retainer or authority to act for *George Graves* as the owner of the property, I think under such circum-

Judgment.

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stances very little attention should be paid in a court of justice to any equity claimed by or for *George Graves* on the pretence of such a retainer.

Mr. *Smith's* letter to Mrs. *Graves* of the 31st of July, 1848, shews that he had heard some months before that date that Mr. *Bridge* (I presume he meant *Samuel S. Bridge*) held a deed from *one Samuel Doty*, conveying all the 980 acres to him; and that he wrote to Mrs. *Graves*, acquainting her with that fact, and desiring that she would give any information she had as to *Doty's* right to convey the lands. That letter was a natural and proper one for him to have written upon the occasion, supposing that he had been hitherto acting in the matter, for the puposes which he admits he was. We do not see what answer, if any, he received, but in his answer to the plaintiff's bill Mr. *Smith* states that Mrs. *Graves* either was, or pretended to be, ignorant of the fact, and urged him to proceed with the action.

Judgment.

If nothing was heard of *George Graves* later than by his letter of the 12th of April, 1843, then seven years had elapsed before the arrangements made by the defendants with *James Graves*, in October, 1850, without any intelligence from *George Graves*, this plaintiff, who was beyond seas, and there was that foundation, and no other, for assuming at the time of the conveyance made to *James Graves*, on the 14th of October, 1850, that *he* was then the heir of *George Graves*, and so would be entitled to any land in Upper Canada, of which *Adam Graves* had died seised and intestate.

It seems a natural inference, however, from Mr. *Smith's* letter of the 22nd of September, 1849, to Miss *Graves*, that Mr. *Smith* knew at the time of the trial of the ejectment, which had taken place a few days before, that a letter had been received from *George Graves*, dated the 12th of April, 1843, which was clear proof that he was alive at that time; though Mr. *Smith* had

not been allowed, as he states, to read the letter, and had it not in his possession to produce upon the trial. If there was no later intelligence of him up to October, 1850, when the conveyance was made, then the presumption of his death would at that time apply; and it is not disputed that *James* was his next heir, and so would have succeeded to any right in this land that *George* had held. But it is now placed beyond doubt that *George Graves* had absolutely no interest whatever in this land, and never had any. This is clear so far as regards the lots 17 and 18 in the first and second concessions; but I observe that the deed from *Adam Graves* to the Rev. *John Doty* makes no mention of the broken lot in front of the lots 17 and 18. That probably arose from the circumstance which I have stated, that *Graves*, as I gather from his deed, had not at that time the patent in his possession, which may have been lying in the secretary's office at Toronto. He seems to have taken as his guide in making the conveyance, the copy which he held of the land board certificate, which may only have specified the four full lots, and the broken fronts may have been added in making out the patent.

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Judgment.

I do not recollect that in the argument before us any notice was taken of the fact that the deed from *Adam Graves* did not mention the broken fronts.

Throughout the case indeed it has been assumed that the whole 980 acres had become vested in *Samuel S. Bridge*, and the plaintiff's bill so states the case.

Then the case stands thus:

In 1797 the Crown granted these 980 acres of land in Pittsburgh, to Captain *Adam Graves*. In 1801 *Adam Graves* sold them, with the exception I have noticed, to the Rev. *John Doty*, in exchange for lands in the parish of Sorel, in Lower Canada, in which parish at that time both *Adam Graves* and Mr. *Doty* lived; and this land which *Graves* got in exchange, his family,

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it seems, afterwards sold. The Rev. *John Doty*, having received from *Adam Graves* a proper and formal conveyance, which was produced, and is in evidence, gave these lands in June, 1815, to his nephew *Samuel Doty*, of Quebec, surgeon, in consideration of his natural love and affection for him, and made, it appears, such an assignment of them through the agency of a notary public, as we know is customary with respect to lands in Lower Canada, and this deed assumed to convey not only the four lots of 200 acres each, but the broken fronts also, in all 980 acres.

On the 3rd of October, 1835, *Samuel Doty* sold and conveyed the 980 acres to *Samvel S. Bridge* of Montreal, for £286; and *Bridge* dying intestate somewhere about 1847 or 8, his son *Thomas H. Bridge* became heir to whatever *Samuel Doty* could convey, and had conveyed to *Samuel S. Bridge;* and on the 3rd of July, 1849, he released all his interest to the defendant *Smith*. This release, though expressed to be made for a consideration of £100, was in fact made for £25; the defendant not agreeing to give more, for the reasons stated by him, namely, that at the time there was no deed discovered from *Adam Graves* to the Rev. *John Doty*, nor any means of shewing that *Graves* had ever divested himself of his title; and for the further reason that *Thomas H. Bridge* having become bankrupt, his property real and personal had gone to his assignees, so that *prima facie* he had no beneficial or legal interest to dispose of.

Judgment.

During all this time, that is, from 1801, when the deed to the Rev. Mr. *Doty* was made, to 1849, there is no evidence that either *Adam Graves*, or this plaintiff, or his father, the eldest son of *Adam Graves*, had ever entered upon the land or asserted any interest in it, or acted in any manner inconsistent with the fact that they had since the sale to *Doty* in 1801 ceased to have any claim to the property, that is if we take the deed from *Adam Graves* to the Rev. *John Doty* to have covered

all the land in the patent, notwithstanding the terms of the deed, about which I do not recollect, as I have already mentioned, that any point was raised on the argument. It was assumed, I think, that *Adam Graves* had parted with all that he held, as I have little doubt he intended to do.

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There are one or two other points in the case, upon which little or no stress was laid in the argument, because they were, I suppose, rightly considered to be unimportant; I mean the fact that the instrument by which the Rev. *John Doty* assumed to convey to *Samuel Doty* does not seem to have been under the seal of the grantor, but for all that appears, may have only been a notarial instrument of such a description that it could not be effectual to convey lands in Upper Canada.

That at any rate can be of no consequence in the case, because the deed from *Adam Graves* to the Rev. *John Doty* was one liable to no such objection; and if that deed diverted the title from *Adam Graves*, it is immaterial to this case what became of the title afterwards. If in consequence of any want of due form *Samuel Doty* took no estate, then *Thomas H. Bridge* could never have held any, and the foundation of the supposed claim to relief in this case would be that the defendant *Smith* took a quit claim from a man who had no interest relating to lands in which the plaintiff in this suit also never in fact had (and, for all that appears, had never up to that time supposed that he had) any interest.

Judgment.

So also, as to the proof of *Thomas Bridge's* bankruptcy, and the appointment of assignees to his estate, all which it is shewn in page 41 of the case, was before he executed the deed of the 3rd of July, 1849, if that would have any effect in this suit, when no claim is set up by, or under the assignees, it could only shew that the release which it is complained the defendant *Smith* took in breach of a confidence reposed in him by this plaintiff,

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was a release that could affect nothing, being given by a person who had no interest to release.

In 1854, I think, it has been stated the present plaintiff made his appearance in this country; and in 1855 brought some actions at law against parties in possession; and in 1857 he filed the present bill.

Upon the whole there are some points in this case which are not made to appear quite clear upon the evidence. If Miss *Graves*, or *James Graves*, or *Thomas Bridge*, or any other witness whom the plaintiff could have called, could have made out a stronger case for the plaintiff, it was for him to consider whether he should not have such witnesses examined. As it is, the case rests upon the deeds and correspondence produced, and upon the explanations given by the defendants *Smith & Henderson*, when called by the plaintiff. It may be surmised
Judgment.
that the transactions may not have been in all respects such as stated in the evidence, or conducted in the spirit, or with the views which that would lead us to suppose. But we are not at liberty to imagine facts, or intentions, which are disclaimed, and denied on the one side, and not proved on the other.

As was remarked by Lord *Thurlow* in *Fox* v. *Mackreth*, (*a*) a leading case upon the doctrine of equity, which we are now considering: "When once one gets beyond the evidence that is before the court, there is no end of conjecture."

Confining myself, as we must, to what is in evidence, and placing what appears to be a reasonable construction upon it, I think it is not proved that *Smith & Henderson* were retained, as the bill asserts, by the plaintiff's mother "acting on his behalf, as the heir-at-law of Captain *Graves*, to commence proceedings for the

(*a*) 2 Bro. Ch. Cases, 422.

recovery of this land." Mrs. *Graves* did not pretend that she had any authority or right to represent her son *George Graves*, in this or any other matter; and it is not shewn that she had. She did nothing more than acquiesce in Mr. *Smith's* taking the course he proposed for removing trespassers from the land, who might otherwise in time acquire a title. She was very careful to have it understood that she "would not incur expense in any shape for the attainment of that object. The only construction that can fairly be put on Mrs. *Graves's* letter is, that she had no objection to *Smith & Henderson* going on, at their own risk as to costs. "I have not heard," she wrote, "from my eldest son for many years." "For any thing I know to the contrary he may not now be in existence." And in the same letter she adds, "I am willing to accept your offer of waiting for your remuneration in establishing his title, until his return, if he ever does, *or any other legal heir shall claim it.*"

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Judgment.

Though this is not altogether grammatically expressed, it is evident from the last words of the sentence that she gave Mr. *Smith* fairly to understand that she could not tell to whom he would have to look for remuneration for his services that were to be voluntarily rendered in the first instance; nor on whose behalf, nor for whose benefit he would in fact be acting. She could not answer for her eldest son being then in existence, but intimated that if Mr. *Smith* was willing to take his chance of being paid by him, or by the other legal heir, whoever he might be, for his professional services in turning off the trespassers, she had no objection to his going on. "Under these circumstances," she says, "you are hereby authorised to take such steps as shall conduce to the end in view." It is plain that she was not pretending to any authority to bind this plaintiff, her eldest son in any way; and it is not shewn or pretended that she had any such authority.

1802.

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It has not been proved that either Mrs. or Miss *Graves* gave to Messrs. *Smith & Henderson* any instructions or information respecting the title to this land, or had any information to give; and it is not shewn or asserted that between this plaintiff and *Smith & Henderson*, or either of them, there was any communication whatever, either personal or by writing. Whether under such circumstances the relation of attorney and client could be said to be existing between *Smith & Henderson* and the plaintiff, in such a manner that it could be held that a confidence was reposed by the plaintiff which should bring this case under the general principle on which the plaintiff relies, is a question which would have required to be carefully considered, if the case had depended wholly upon the fact that the attorneys had taken upon themselves to bring ejectments in this plaintiff's name, but without his authority or knowledge, and without authority from any one empowered to act for him. If indeed the plaintiff had been aware of the proceedings, and had in any way sanctioned them, or taken the benefit of them, or had suffered them to proceed without objection, then the effect would have been the same as if he had employed *Smith & Henderson* in the first instance; and though nothing of that kind has been proved, yet, if the plaintiff could shew that he has suffered any injury by Messrs. *Smith & Henderson*, having assumed to sue in his name, without his authority or knowledge, I have no doubt he could recover damages from them for such injury.

Judgment.

But there is more to be considered in this case—Messrs. *Smith & Henderson* admit throughout in their answers, and in their statements made as witnesses, that in what they did they were acting as the attorneys *for the heir of Adam Graves, and under* a sense that they were bound in what they did to consult his interests. They do not deny the responsibility or seek to evade it on the ground that they had not been previously retained,

or were acting, or had a right to act, on their own account, and the plaintiff founds on this admission the argument that they do thereby in effect acknowledge themselves to have been all the time acting *for him George Graves*, because he was in fact the heir.

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But I think it is right to consider that the attorneys had been from the first uncertain who was the living heir of *Adam Graves*, and that while they were acting for *the heir*, it is clear they make the admission in that sense, and subject to the uncertainty who the heir might be.

It is no doubt right to look upon them as acting professionally for the heir of *Adam Graves*, who, as they had ignorantly assumed, but not in consequence of any instruction or information derived from him or his agent, represented this property. It is clear, too, on the evidence that when Mr. *Smith* in July, 1849, took the release from *Bridge* of all his interest, he professed to take it on behalf *of the heir*, and to fortify *his* supposed title. It is true he did not insert any words in the deed that gave any intimation of such a trust, but he admits it fully. "I stated to Mr. *Bridge*," he says, "that I had been employed to bring actions for the property; that I had discovered that he had a title, and if he conveyed it to me, I would *convey it to the heir*. I subsequently conveyed it to *James Graves*, at the request of his sister, who introduced him to me, thinking he was the heir."

Judgment.

The plaintiff insists that as Mr. *Smith* has admitted that he took the conveyance for the heir, and as he the plaintiff was in fact the heir, that he took the conveyance in trust for *him*, *George Graves*, and that he has violated that trust by conveying to the plaintiff's brother. Messrs. *Smith & Henderson*, on the other hand, insist that the conveyance was made to the person whom they had reason to believe to be the heir, in consequence of the

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event of the ejectment in 1849; and that the conveyance to *James Graves* was made not in fraudulent or intended violation of their undertaking or duty, but as a supposed compliance with it. The evidence shews that when the deed to *James* was made there was no knowledge that *George* had been heard of, or was living within seven years, while it was known that he had been more than twenty years absent beyond seas, *James Graves* is his eldest brother, and it is not in evidence that *George* had any lawful issue who could have inherited if he had been in fact then dead.

It is now clear, however, that in conveying to *James Graves* as the heir of *Adam Graves*, a mistake was committed, for his elder brother was at the time living, though not known to be so.

Judgment.

So far as regards any really equitable consideration the propriety or impropriety of conveying to *James Graves* is not to be determined by what was discovered afterwards, but by what appeared, and was supposed to be the fact, when that was done which is complained of as improper. That men must in many cases be held liable to answer for the consequences of errors into which they have ignorantly fallen is undeniable, but that is in cases where some pecuniary injury has been sustained. Here there has been none, for the plaintiff had no right to the land in question that by any act of the defendants was or could be divested or impaired.

Besides, it appears to me that wherever in the correspondence, or evidence, *Smith & Henderson*, or either of them, speak of the heir of *Adam Graves*, they must reasonably be considered to mean that descendant of his who inherited this property; not merely the person who by affinity was his heir, but the person who while these proceedings were going on was really entitled to this land in Pittsburgh, as his heir, or had at least some colour of right to it.

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When it was ascertained, as the plaintiff in his bill admits it was, that the land had belonged to *Bridge*, and when we see, as we do, from the deeds before us, that the legal estate which the plaintiff admits was ascertained to be in *Bridge*, was not merely the dry legal estate, or some outstanding interest or title which was necessary to be got in, in order to perfect some real interest or title of which the heir of *Graves* was seised, but that the ancestor of the plaintiff had for a good consideration divested himself more than fifty years ago of the property by conveying it to a purchaser, so that he or his heirs could no longer be the owners: when we see this to be the truth of the case, we must see, I think, that the plaintiff has no good ground for coming to a court of equity to seek to disturb the title or possession of other parties. He has no claim of any kind to stand upon—I mean no interest—and never had any interest in this property to protect. If the court should interfere it would not be to redress any actual injury, for none has been suffered by the plaintiff, but simply to vindicate the principle that a confidence reposed is not to be abused. That the courts will sometimes interpose in cases solely on that ground, I have no doubt, but I think, for the reasons I have stated, that the facts of this case are not such as should induce us to do so, whatever we may think of the conduct of any of the defendants, and certainly not after the property has been dealt with as it has been since 1850, involving the interests of many parties, some of whom have made extensive improvements.

Judgment.

In *Lester's* case (*a*) it is said, "A man was guardian or trustee for an infant to whom lands are descended or devised, but the title in truth was in a third person; if the trustee or guardian buy in the title of this third person, this shall not be taken to be a trust for the infant, for he is at liberty to purchase it as well as any body else, and so it was held in the case of *Combes* and *Throckmorton*, by the Chancellor."

(*a*) 2 Freeman, 52.

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In *Norris* v. *LeNeve*, (*a*) a case before Lord *Hardwicke*, in which the judgment was affirmed on appeal to the House of Lords, a trustee for a term of ten years, during the infancy of the *cestui que trust*, took a conveyance to himself of the reversion from the heir of the lessor for £30 only, the estate being worth £1500 per annum, Lord *Hardwicke* said, "it was a transaction extremely to be disapproved; "* * * "a counsel or agent," he said, "taking a conveyance from the right heir for his own benefit, and which he discovered by his being a trustee, does a very wrong thing;" but he refused to declare that the trustee held the reversion in trust for the infant. He thought "there was no ground to stand upon, for the making *Norris*, who had bought in the reversion, a trustee for a person who was only a tenant for life, and took nothing in the inheritance, would be going to far."

Judgment.

This language of Lord *Hardwicke*, is, in this respect, not in point in the present case: that these defendants *Smith & Henderson* do not pretend that *Smith* took the conveyance from *Bridge* on his own account, though he paid for it with his own money. He did take it, they admit, in trust for the heir, and told *Bridge* that he would convey to the heir. There is therefore no question about there being a trust, for it is admitted. But the language of Lord *Hardwicke* is in point, that the plaintiff here had no interest in the inheritance, (not noticing at present the omission of the broken front from *Adam Graves*' conveyance,) and not being heir to the land, he has no substantial ground of complaint. All the parties concerned were in a common error in supposing that the heir of *Adam Graves*, whoever he might be, was the owner of this land, if indeed we can take so favourable a view of the conduct of the *Graves's* as to suppose them ignorant that *Adam Graves* had parted with his land in Pittsburgh. It was a large estate, and was probably his military grant, and must have been an object of interest to his wife and children. In cases of

(*a*) 3 Atk. 88.

this kind, where there has been no injury done, I take it to be always in the discretion of the court to interfere or not, and I confess it appears to me tha. there is no good reason for interfering in this case on behalf of the plaintiff, who did not in fact repose any confidence in *Smith & Henderson*, either directly or through his agent; who had no right that could be injured, or compromised by their intervention, and who has therefore suffered no damage. All that can be said is, that *Smith* took a deed from *Bridge* under the impression that *Adam Graves* had died seised of the land, and that his heir had perhaps a title to it, legal, if not equitable, and that he took it with the admitted intention of conveying it to the heir. He swears that he conveyed it to *James Graves*, believing him to be the heir, though afterwards it turned out that he was not, for the elder brother, whom the court and jury had presumed to be dead, was still living.

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Judgment.

But it has since been made clear that neither the one nor the other can be the heir to this land, because their ancestor had sold and conveyed it away for value. By accident, it may be said, the land got, with the exception of one lot, (18 in the 2nd concession,) into the hands of *James Graves*, for I think it cannot be said upon the evidence that it was certainly conveyed to him, with any intention of violating a trust—*James Graves* is not complaining of *Smith & Henderson*—and we cannot in this suit go into any investigation of their dealings with him. In regard to their transactions with *James Graves*, if they have done any wrong there are proper means of redress; and if from what has been done there results any fair legal or equitable claim against *Smith & Henderson*, or any just cause of complaint at the instance of *James Graves*, or of *Thomas Bridge*, or his creditors, or his assignees, or of any one else, we cannot go into such claim or complaint in this suit, in which it is only the plaintiff *George Graves* who is praying for relief. And as to *George Graves*, unless we are clearly

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entitled, upon the evidence, to conclude that what was done by the defendants in his name was not honestly done, those who have bought the property, and have been in actual possession of it, and improving it, must have a better equity than the plaintiff has, for it is now very clear, and has been ever since the deed from *Adam Graves* to the Rev. Mr. *Doty* was found, that any use that without his knowledge was made of his name, and any connexion of his name with the proceedings in evidence arose only from a mistake; for no one can suppose that if that deed had turned up before 1850 there would have been any thing done in his name, or any reference made to his family, or any trust declared or reserved either verbally or otherwise in his favour.

Judgment.

Taking this view of the case as regards *Smith & Henderson's* liability to the plaintiff, I do not go into the case as it respects the other defendants, the purchasers from them, or either of them, for unless the plaintiff has a good equitable claim for a decree in his favour against the former, he can have none against the latter; and so it is in my view immaterial whether they had or had not notice of the alleged trust in favour of this plaintiff, and whether they would or would not even without notice be liable, so long as any portion of their purchase money remained unpaid.

I cannot but apprehend that my view of this case may not be correct when so many of my learned brothers, whose opinions I respect, differ from it. The circumstance that they do differ makes it proper that I should state as distinctly as I can the grounds on which my opinion is formed.

Seeing, as we do, little, if any thing, more of the facts of this case than is to be found in the testimony of Messrs. *Smith & Henderson* and of *James Graves*, I think there is much ground for inferring that, whether Messrs. *Smith & Henderson* began these proceedings to

dispossess the occupants, of their own accord, or at the desire or suggestion of the person named *Graves*, who was living in Pittsburgh, (which is uncertain upon the evidence,) they acted with a view to some pecuniary advantage to themselves, and probably with the hope that after they should establish the legal title of the heir by a final judgment in a court of justice, they would be able to make a purchase from him upon easy terms.

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What they did in the end leads to this conclusion, for each of these defendants is found to have taken a conveyance of one of the lots to his own use, and the fact that they received the mortgages which were taken upon other portions of the land which were sold to purchasers by *James Graves*, as if he were the owner, contributes to strengthen this impression. We see how this act is accounted for, or attempted to be accounted for, in the evidence.

Judgment.

What an attorney may or may not be justified in doing in the way of dealing with a client in the subject matter that had been in controversy, after the controversy is ended, is discussed in the case of *Oldham* v. *Hand*. (*a*)

But this case before us is founded wholly on the idea of a breach of confidence reposed in Messrs. *Smith & Henderson* by *George Graves*. In the cases of *Fox* v. *Mackreth*, (*b*) *Osmond* v. *Fitzroy*, (*c*) *Carter* v. *Palmer*, (*d*) and in numerous other cases, the reasons for holding the attorney strictly to the proper observance of the confidence reposed in him are fully explained in language which fails in its application to the present case, where there was no confidence reposed by this plaintiff, nor by any agent of his, in *Smith & Henderson*, nor any knowledge on his part of any thing that was done in his name, till every thing had been done that is now complained of. The only construction that can fairly be put

(*a*) 2 Ves. 259.
(*b*) 2 Br. C. C. 400.
(*c*) 3 P. W. 129.
(*d*) 1 D. & Wal. 722.

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upon the letter of his mother, who never was his agent for any thing that is shewn, was, that she had no objection to their proceeding as they pleased to dispossess the squatters, provided it was well understood that they were not to make her liable on any pretence for the costs of what they might choose to do.

No information in regard to the title was given by her or by any one else. She either did not know that the property had been parted with fifty years before, or if she did know it, she improperly concealed it.

As to the fact which is clearly proved that Mr. *Smith* took the release of *Brdges'* right as he now avows, and as he told *Bridge* himself, not for his own benefit, but for the benefit of the heir of *Graves*, that should, I quite agree, be decisive in favour of the prayer of this bill so far as a decree could be properly made against *Smith & Henderson*, that is, so far, I mean, as regards the interest which they retain in any portions of the land, but for the circumstance which is positively sworn to by them, and is not disproved, that when they took the quit claim deed from *Bridge's* heir they did take it for the *benefit of Adam Graves' heir;* and that when they conveyed to *James Graves* in 1850, it was because they believed then that he was the heir, as a court of justice had in effect determined.

Judgment.

I do not consider that the evidence warrants us in holding that in this respect Messrs. *Smith & Henderson* have sworn falsely; and unless they have, they were not guilty of a breach of any confidence that had been reposed in them either expressly or by implication.

In addition to all this, the present plaintiff, we now see, according to his own statement in his bill, stands in the place of the heir of one who had fifty years before parted with the estate in question, and had therefore no interest that could by possibility be injured by the

release taken of all *Bridge's* right, for even if, contrary to what is stated in the bill, the broken front had never been vested in *Bridge*, then *Bridge's* son had no interest to release; and the deed taken from him could no more affect this land than any other land in the province, or than a release taken from any other person. 1862. Henderson v. Graves.

In truth, if any one has been injured by the transaction of Messrs. *Smith & Henderson* it is either *Thomas Bridge*, (or the creditors of his bankrupt estate,) from whom a release was obtained for £25, which, if he had not been told it was intended for the benefit of those who he may have supposed held the legal title, he might not have parted with for any thing like that small sum.

That Messrs. *Smith & Henderson*, however, knew no more than he did, until some years afterwards, that *Bridge's* father had actually received a deed, seems clear on the evidence; and therefore that fact could not have influenced the transaction. Judgment.

The plaintiff according to his own statement in his bill, has no more interest in the subject of this controversy than any other person in whose name such a bill might have been filed without his knowledge: that he cannot have been injured in the remotest degree by any thing that has been done is certain. If, therefore, his suit is entertained it can only be for the sake of vindicating the principle that an attorney cannot be allowed to violate a trust reposed in him, or turn to his pecuniary advantage information which he has derived from a client; and I think we should not be expected to interfere on that pretence alone, where no confidence has been reposed by the plaintiff, or by any one entitled to represent him, and where no remuneration was given by him, or by his agent. A decree in the plaintiff's favour under the circumstances of this case would, I think, be carrying that principle further than it has yet been carried. In many

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cases that have been cited, the courts, it is true, have enforced the principle without enquiring whether the act done by the agent or trustee has been in fact injurious to the person *whose estate* and interest he was bound to consult and to protect; because, as they have said, he is not to be the judge of that; and in the next place, whether the interests of the principal or *cestui que trust* have, or have not in fact been injured by the agent or trustee having mixed his own private interests and transactions with theirs without their knowledge and sanction, would often give rise to enquiries, tedious and expensive, which might not after all lead to any certain conclusion.

But in these cases the person asking for relief has some estate and interest involved—something to protect—which is not the case here, if we take the facts to be as the plaintiff himself has stated them.

Judgment.

The object of this bill is in effect to have the defendants declared by a decree of this court trustees for the plaintiff, contrary, as I conceive, to the usual course of equity as laid down in the cases I have referred to, and also in the case of *Colman* v. *Sorrell*, (*a*) where Lord *Thurlow* says: "Whenever you come into equity to raise an interest by way of trust, you must have a valuable, or at least a meritorious, consideration; nothing less will do."

Upon the ground of the plaintiff's want of any beneficial interest in the subject matter, I think his suit should not be entertained, and that his bill should be dismissed, but not with costs as regards the defendants *Smith & Henderson;* for there is much in the evidence to lead to the conviction that the solictiors were acting in the matter with a view to secure a pecuniary interest to themselves, though professing to have only in view the object of dispossessing the squatters for the benefit of the

(*a*) 1 Ves. Jr. 55.

owners of the land, whoever they might be. The portion of land which each received, and the further fact that they procured from *James Graves* assignments of the mortgages to him which the purchasers of other portions of the property had given for the purchase money, goes very far to shew that although the purchasers took their title from *James Graves*, the sales were in fact respectively made on behalf of Messrs. *Smith & Henderson*, or of one or the other of them. There is evidence tending to shew that all this was upon an arrangement made between *James Graves* and them in consideration of their services and expenses, and money paid or advanced by them, but the testimony on that point appears to me to be very loose. I would therefore not give them their costs on dismissing the bill, but to the other defendants I would give costs.

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ESTEN, V. C.—I have perused the pleadings and evidence as regards the *Bryants*, and think they are entitled to no relief whatever, as to their covenant. Looking to their own answer, it does not state enough to entitle them to a specific performance, and the sale to them by *James Graves* cannot operate as an execution of the covenant, being for little more than half the land, and at a less price. Then the money has never been received by *George O. Graves:* they do not pretend that they tendered the money within the time. They would have now to take the remainder of the land, and pay cash for it, if a specific performance were decreed. An enquiry can end only in disappointment, for we must take the answer as stating the case as strongly as the facts warranted: and the master must report that they are not entitled to specific performance. A bill in the shape of the answer would be demurrable. Their purchase money not being fully paid they could not avail themselves of the plea of purchasers for valuable consideration, without notice.

Judgment.

Charles Edward Clarke has not paid his purchase

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money. *John R. Clarke* was thought to have had notice through Mr. *W. McDonald*, but it seems extremely doubtful if such would be a right conclusion, and it is unnecessary to express any opinion on this point.

I think, therefore, that the decree should be affirmed in all respects except as to *John R. Clarke*, and except that the defendants should be allowed for permanent improvements, and of course in respect of the purchase money paid by *Smith* for the land on the purchase from *Bridge*. As to *John R. Clarke*, it would seem that the bill should be dismissed with costs, supposing notice not to be established against him. Upon the general doctrine that an attorney proceeding for the recovery of an estate for a particular person, his client, and acquiring an outstanding title, becomes as to such title a trustee for his client, I think there can be no doubt.

Judgment.

RICHARDS and HAGARTY, JJ., concurred in the judgment pronounced by his lordship Mr. Justice *Burns*, his lordship Mr. Justice *Hagarty* stating that he did so with much reluctance, and only because he felt himself bound by adjudged cases. The principle of equity which is here enforced must, in this country, be often attended with the harshest results; for a case may well be conceived in which a grantee of the Crown with the patent in his hand, shewing no trust or confidence whatever, goes into the market and sells for £1000, payable by instalments; which sale is duly completed by conveyance and mortgage, and all the purchase money subsequently paid up with the exception of the last instalment, say £50, when notice is given to the purchaser of a trust in favour of a third party: under these circumstances one cannot fail to see the great hardship of taking this property from the purchaser after, it may be, spending many years in improving it; and yet, applying the rule strictly, as we are bound to do according to the adjudged cases, the court is bound to decree in favour of the person beneficially interested.

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[*Before the Hon. Sir J. B. Robinson, Bart., C. J.; the Hon. W. H. Draper,* C. B., C. J. C. P.; the Hon. Mr. Justice McLean;† the Hon. Vice-Chancellor Esten; The Hon. Mr. Justice Burns; the Hon. Vice-Chancellor Spragge; the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.*]

ON AN APPEAL FROM A JUDGMENT OF THE COURT OF COMMON PLEAS.

Between THE BANK OF TORONTO, *Appellants, and* WILLIAM ECCLES AND OTHERS, *Respondents.*

Assignment for benefit of creditors—Preferred creditors—Power of debtor to insist on release by creditors.

Where a debtor had, before the passing of the statute 22 Vic., ch. 96, assigned and surrendered his estate and effects to trustees for the satisfaction of his debts without reserve, *held*, affirming the judgment of the Court of Common Pleas, that he might, under the then state of the law, stipulate for the payment of some of his creditors in full, and a ratable distribution as to the rest; and also, for a release to himself from all further liability. [ESTEN & SPRAGGE, V. CC. dissenting.] *Held* also, that such release may still be insisted upon without any reference to the amount of the dividend to be paid by his estate.

This was an appeal from a judgment of the Court of Common Pleas, as reported in the tenth volume of the reports of that court, at page 282, where the facts of the case are distinctly set forth. Statement.

Mr. *J. Hillyard Cameron*, Q. C., for appellants.

Mr. *M. C. Cameron* and Mr. *Anderson* for respondents.

The cases cited by counsel appear in the judgments of their lordships.

Sir J. B. ROBINSON, Bart, C. J.—This is an action of ejectment brought by the plaintiffs, who claim the

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* Gave no judgment in the case.
† Was absent when judgment was pronounced.

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fee in the land as purchasers at sheriff's sale, under a writ of *fi. fa.* against lands upon a judgment in their favour against *John L. Ranney*.

The defendants claim as assignees of *Ranney* under an assignment made on the 4th of January, 1858, and registered 6th January, 1858.

The judgment against *Ranney* was entered up on 8th January, 1858, and was registered on the next day. The sale under that judgment was made on 15th February, 1859, and the sheriff's deed to the plaintiffs was executed 5th March, 1859.

The deed of this land to the defendants of 4th January, 1858, is expressed in the deed itself to have been made in consideration of five shillings, and by it the land was granted to the defendants, "to hold as joint tenants, and not as tenants in common, and to the survivor of them and the heirs of such survivor for ever." There is no mention in this deed of any further consideration than the five shillings.

Judgment.

On the next day (5th January, 1858) *Ranney* executed another deed to the same grantees, (the three defendants in this action,) in which he recited his deed to them of the 4th of January, and other conveyances which he had made to the same grantees of other lands; and he recites further, that the lands mentioned in the said indentures so referred to were conveyed to the said grantees (although it was not so expressed in the said indentures) upon the like trusts and for the like purposes as those for which the said *Ranney* did, by the deed of 5th January, 1858, containing these recitals, assign to the same grantees his personal estate and effects; and by this deed he assigns all his personal estate to these defendants, their executors, administrators and assigns, to have and to hold all the lands and tenements mentioned and described in the

several indentures before-mentioned; and all and singular, the personal estates (enumerating the various descriptions of personality) to the said grantees, (these defendants,) their heirs, executors, administrators and assigns, to their own use for ever; but upon the trusts thereinafter mentioned.

These trusts are to sell the whole of the said property, real and personal, and out of the proceeds to pay first the charges attending the trusts. Secondly, to pay to a long list of creditors of the grantor therein named their debts in full. And thirdly, to take up certain bills and notes that had been made or endorsed for the accommodation of the grantor. And the defendants covenant in this deed that they will faithfully execute the trusts, and will at the request of the parties of the third part to this deed (that is the creditors of the grantor who shall execute the deed, or the major part of them) account with them in writing concerning the said trusts, and will make a just distribution of all trust moneys which they shall receive (after the deductions before-mentioned) amongst the subscribing creditors, according to the true intent of the deed.

Judgment.

Then follows a general release from the executing creditors to the grantor *Ranney*, of all actions, claims and demands on their part, provided that no creditor who should not execute this deed within thirty days from the date should be entitled to any benefit under it; and the proportion of the proceeds which such non-executing creditors would have been entitled to receive—if they had executed within the time—shall be paid over to the executing creditors in proportion to their respective debts.

And lastly, it is provided, that the trustees shall pay over to the grantors any surplus that shall remain after paying to the executing creditors the whole of their respective debts, and paying the prior charges provided for in the deed.

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When the defendants set up their title under these deeds at the trial, several objections were taken on the part of the plaintiffs, and among them the objection that the clause in the trust deed which provides for a release in full by the creditors who shall execute the deed, made the assignment invalid, because it excluded from the benefit of it all such creditors as should refuse to accept of their dividend out of the property assigned, upon that condition.

Doubts had been thrown out in both the common law courts in this country of the validity of trust deeds executed by an insolvent debtor containing such a clause of release; and the learned judge at the trial acceding, for the time, to the objection, directed that a verdict should be entered for the plaintiffs, reserving leave by consent of parties to the defendants to move to have a verdict entered in their favour, if in the opinion of the court the plaintiffs were not entitled to recover upon the evidence.

Judgment.

The defendants having moved accordingly in the Court of Common Pleas, judgment was given making the rule absolute for setting the plaintiffs' verdict aside, and entering a verdict for the defendants; and that judgment has been appealed from.

The other objections to the defendant's title, besides the one I have mentioned, were that the conveyance of the land to the defendants by the deed of 4th January appears by the deed to have been made for a consideration of five shillings only, and is in effect a voluntary deed; and that such nominal consideration, and no other being expressed, it was illegal to receive evidence *aliunde* to establish a valid consideration by shewing that the land was in fact conveyed to trustees to be sold with the view of paying the grantor's debts out of the proceeds.

It was objected, also, that the deed of the 5th January

was not shewn by the evidence to have been made in full accordance with what was intended by the parties to it, at the time of the deed of 4th January being executed, but varied in several particulars; wherefore it was contended that the deed of 4th January cannot be said to have been made upon the considerations which may be collected from the face of the second deed, because they were not in the mind of the grantor at the time, and did not move him to make the deed of the 4th January.

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And further, it was objected, that the trust deed of 5th January never having been registered the registered judgment in favour of the plaintiffs cannot be affected by it, and cannot be postponed by reason of the prior registration of the first deed, if that first deed, taken by itself, does not shew a valid title.

It was upon the objection which I have first stated and which is relied on as the 4th reason of appeal, that the argument for the appellants principally turned; but I will first state my opinion on the other points: 1st.—As to the exception that the deed of the 4th January, 1858, being stated (in the deed itself) to have been made upon a consideration of five shillings, any evidence *aliunde* to prove another and more valuable consideration was inadmissible, as being repugnant to the deed: I have no doubt that the exception is not tenable. The title of the defendants is not resisted by any person claiming to hold as a purchaser for value from *Ranney* under a deed made subsequent to that of 4th January, 1858. This, therefore, is not a case under the 27 Elizabeth, ch. 4, which was made specially for the protection of such subsequent purchaser against prior fraudulent conveyances.

Judgment.

The question is, whether the deed to the defendants is void under the statute 13 Elizabeth, ch. 5, passed for the

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protection of creditors against fraudulent conveyances, or is void at common law?

Whatever may have been held in cases coming only under the statute of 27 Elizabeth, respecting voluntary conveyances being necessarily and as a legal inference void against subsequent purchasers, upon which point the language of judges has not been always consistent, (*a*) there is no doubt, I think, that under the statute 13 Elizabeth, ch. 5, a creditor resisting a conveyance upon the ground that in the language of that act, "it is feigned, covinous, and fraudulent, and contrived of malice, fraud, covin, collusion or guile, to the end, purpose, and intent to delay, hinder or defraud creditors of their just and lawful actions, debts," &c., must shew something more than the mere want of adequate and valuable consideration; because a man acting honestly and in good faith, and having no design to delay or defeat creditors, is not disabled by that statute, or unable at common law to make a voluntary gift of his lands; or at least it may be said that the jury must be satisfied of something more than merely that the deed was made without a valuable consideration, before they can find it to be fraudulent as against creditors.

Judgment.

And if, as against persons not becoming creditors subsequent to the deed, but who were creditors before it was made, the jury cannot properly be told that in the absence of other evidence they may treat the total absence of consideration, or a grossly inadequate consideration, as *prima facie* leading to a conclusion of fraudulent intent, then it must on the other hand be open to the person claiming under the deed to uphold it against the imputation of fraud, by giving evidence *dehors* the deed of the intent and purpose for which it was really made.

The case of *Gale* v. *Williamson*, (*b*) cited in the

(*a*) Roberts on Fraudulent Conveyances, ch. 1, sec. 4 & 5.
(*b*) 8 M. & W. 405.

judgment appealed from, is a clear authority on that point; and it is indeed admitted in this case that the conveyance by *Ranney* to the defendants was in fact made in good faith, and was not collusive, but really intended for the benefit of creditors; while the objection which I am now considering is founded upon the assumption of the deed being purely voluntary, and without any other consideration than that which the deed of the 4th of January expresses.

This admission would of itself take this case out of the statute, which says not a word of voluntary conveyances, and still less provides that deeds appearing on the face of them to be voluntary shall without hearing evidence upon the truth of the case be treated as void, however honestly intended, and though not made to defeat creditors.

Then if evidence could be properly received, as I have no doubt it could, to shew that the nominal consideration of five shillings expressed in the deed was not the only consideration upon which it was made, we must be at liberty to receive evidence of what the real purposes and objects of the deed were; and when this point is settled it cannot be seriously contended that the case can be at all affected by the circumstance that *Ranney* seems to have changed his mind in respect to some of the arrangements which he had in view between the execution of the deed of the 4th of January, and of the declaration of trust made on the following day. Judgment.

The execution of the first deed, while we are considering the question of fraud or no fraud, must be looked upon as the mere inception of the arrangement—a preparation for securing the general body of his creditors, by creating the trust which he had then in his mind, and which he perfected the next day. It should be all regarded as one transaction, (*a*) and it can be no objection that the declaration of trust which he executeddif-

(*a*) 11 L. J. N. S. Chancery, 105.

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fered in some respects in its details from that which he had contemplated the day before; that could not have the effect of establishing fraud against the truth of the case.

Then as to the point that the trust deed of the 5th of January having never been registered, the judgment of the plaintiffs, though subsequent, being entered on the 8th of January and registered on the 9th of January, 1858, will prevail over the defendants' registered conveyances of the 4th of January: what the plaintiffs mean to contend is, that the deed to the defendants of the 4th of January, if it stood alone, must be treated as fraudulent, because it is on the face of it voluntary; that it could not have stood alone against the judgment creditors, and cannot receive aid from the declaration of trust, because the deed is still unregistered, and so must be treated as fraudulent against the plaintiffs' registered judgment. (*a*)

Judgment.

But I think it was rightly held, in the court below, that as soon as we find that the authorities warrant the refusing to exclude evidence of a consideration beyond the five shillings expressed in the deed, there seems to be an end of this objection. It is under the deed of the 4th of January, 1858, that the defendants make title; and if that deed is not in itself void, merely because a valuable consideration does not appear on the face of it, then all descriptions of evidence may be resorted to in order to ascertain the real objects and intention of that deed, and thus to settle the question of *bona fides*. The objection amounts to this—that the unregistered declaration of trust is not admissible evidence, even to show the object with which the first deed was made, because we are to take the declaration of trust to be void as against these plaintiffs, who registered their judgment. That proviso of the registry law, however, would only

(*a*) Consol. Stats. U. C., ch. 89, sec. 53.

extend to prevent the declaration of trust from directly affecting the plaintiffs' interest. It could not annul the trust as between *Ranney* and his assignees, which might be established as well without deed as by a deed registered. And, fraud apart, if the deed of the 4th of January must stand alone, then the defendants would hold the estate discharged from the trusts, if the deed of the 5th of January could not be advanced for any purpose in this case. The effect of the declaration of trust is to cut down the estate of tho defendants; and the effect of the Statute of Frauds, in its provision regarding trusts, is, not to require that all trusts shall be *created by writing*, but that they shall be manifested and proved by writing, plainly meaning that there should be evidence in writing proving that there was such a trust, and on this principle it is that an express declaration of trust by a bankrupt, after his bankruptcy, has been held good, and when a defendant by his answer in Chancery admits a trust it is taken as sufficient to establish it. (*a*) Besides this, it is admitted in this case that the trustees have acted in the trust, and have sold real and personal property to the amount of £7000 or £8000. This last circumstance deserves notice in determining the main point in the case, that is, whether this assignment of *Ranney's* real estate for the benefit of his creditors should be held fraudulent and void on account of the clause in the declaration of trust, which exacts from all executing creditors a release of their debts and demands in full, as the condition of their receiving any benefit from the proceeds of the property assigned.

Judgment.

We should not, except upon the most clear and conclusive authority, determine that a deed is void which has already been acted upon to so great an extent; for though *bona fide* purchasers from the assignees, without notice of the terms of their trust, might not be exposed to be disturbed in their titles, yet litigation might spring up in regard even to the property that has been sold by

(*a*) 3 Ves. 707; 1 Atk. 59; 2 Ver. 288.

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the defendants, and the affairs of the trust might be placed in an embarrassing position.

In the case of *Owen* v. *Body*, (*a*) determined in 1836, and in the later case of *Janes* v. *Whitbread*, (*b*) and *Coates* v. *Williams*, (*c*) assignments which had been made by debtors of their estates to trustees for payment of their debts, were resisted by execution creditors, on account of a clause which the assignment in each case contained, providing for the trustees continuing the business which the debtor had been carrying on, in order to the winding up more advantageously the affairs of the estate. The terms of this provision were not exactly the same in all cases: the deed that was executed in *Owen* v. *Body*, being such as afforded more ground than the deeds in the two other cases, for contending that the business being to be carried on for the benefit of the creditors of the assignor, who were to be paid dividends rateably out of the proceeds of the business on account of their debts, it would follow, as a consequence, that the creditors who, by executing the deed, should come in under it, and participate in the profits, would render themselves liable as partners for all the debts contracted in carrying on the business. It was on that account objected to by the execution creditor that the assignment did not make provision for a just distribution of the effects of the debtor among his creditors—since those only could take the benefit of it who might be willing to subscribe a deed making them partners with the trustees—that they might justly object to incurring such a liability; and besides, as was remarked in discussing, at a later day, the effect of such a provision, it is to be considered that by employing in trade the goods and the assets of the debtor, "they put in peril the effects which ought to have been divided equally amongst the creditors."(*d*)

Judgment.

It was put strongly to the court that the creditors

(*a*) 5 Add. & Ell. 28. (*b*) 11 C. B. 406.
(*c*) 7 Ex. 205. (*d*) Cox v. Hickman, 30 L. J. N. S. 125.

generally could not be expected to become parties to such a deed, and yet if they did not come in, they would be *delayed and hindered* of their just actions and debts within the meaning of the statute 13 Elizabeth. 1862. Bank of Toronto v. Eccles.

The validity of the assignment had been objected to upon another ground connected with this same provision. The court thought that first objection futile, and disposed of it at once; but the second objection of the deed seeming to make the creditors partners with the trustees in carrying on the business brought up, as Lord *Denman* remarked, a very doubtful question, upon which the court must take time to consider.

A fortnight afterwards, in the same term, Lord *Denman* disposed of the case as follows: "On consideration, we think that upon the second ground of objection this assignment was not good. The deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit. The assignment, therefore, was invalid." Judgment.

In the two later cases to which I have already referred, of *Janes* v. *Whitbread*, and of *Coates* v. *Williams*, the deeds of assignment in both cases, exactly the same in their terms, were substantially different from that in *Owen* v. *Body*, in the nature and extent of the provision which they all contained, for continuing the business of the debtor by the trustees for the benefit of the creditors.

The courts which determined the two last cases, held that the assignments then before them did, clearly, not make the executing creditors partners with the trustees in the business to be carried on, and, therefore, held that the objection taken on that ground to the assignment was not fatal. They pointed out essential differences between the provisions respecting the continued business contained in those assignments, and that in

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question, in *Owen* v. *Body*, and grounded their decision entirely upon that difference.

Fifteen years had elapsed between the judgment given in *Owen* v. *Body* and those cases, which afforded ample time for considering the soundness of the decision in *Owen* v. *Body*, first, as to the legal inference, that the executing creditors would, in that case, have made themselves partners with the trustees in the business to be carried on; and next, as to the consequence of such a provision, that being unjust and unreasonable in itself, it invalidated the assignment.

Judgment

The only doubt which the courts seem to have had in either of the latter cases was, as to the effect of the assignment before them in creating a partnership business. If it had done so, they seemed quite prepared to have followed *Owen* v. *Body* in holding the assignment to be invalid; and while they pointed out what they considered to be essential differences between the terms of the assignments, they did not seem to doubt that upon the question of partnership or no partnership. *Owen* v. *Body* had been rightly decided. They intimated no dissent from that judgment on either ground, but they held it not applicable in the cases before them, on account of the difference of the terms of the assignments.

The late Lord Chief Justice *Jervis*, of the Common Pleas, in giving judgment in *Janes* v. *Whitbread*, explained the only ground of the difference. "As to the first point," he said, "the court granted the rule expressly for the purpose of having the deed contrasted with that upon which the case of *Owen* v. *Body* had been decided." Upon examining that case, however, he remarked, "I am of opinion that it is not applicable to the present, for there the deed contained minute provisions, investing the trustees with power to carry on the trade, for which purpose they were authorised to

lay out money in payment of rent, &c., and in keeping up the stock; and the court *held the deed void, as being one which creditors could not reasonably be expected to become parties to.* Here, however, the deed contemplates the sale of the property, and the winding up of the business; and the power given to the trustees to carry on the trade was evidently intended to be merely subsidiary to the winding up of the concern."

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In the same case *Maule*, J., expresses his entire concurrence in the decision of *Owen* v. *Body*. "I also think," he said, "for the reasons already given, that this case is clearly distinguishable from *Owen* v. *Body*. What is there said by Lord *Denman*, understanding his language with a reasonable reference to what he is speaking about, lays down, I think, a sound and a reasonable rule. The main object of the deed in that case was the carrying on an extensive business, for the purpose of making money to pay the creditors who became parties to the deed. Here the object is merely to wind up the concern. That is a clear, plain, and intelligible distinction."

Judgment.

While the argument was going on, the Chief Justice interposed with this observation, "The deed in *Owen* v. *Body* contemplated the doing of many things, but there must be some limit. The meaning of that case, I apprehend is, *that the deed was one which no creditor could in reason be expected to execute.*" And *Maule*, J., in the course of the discussion, vindicated the decision of *Owen* v. *Body* by these very clear and forcible observations: "All deeds of this sort are within *the letter* of 13 Eliz. ch. 5, sec. 2, which declares that all deeds made to or for any intent or purpose before declared and expressed shall be void; that is, all deeds made to or for any of the intents or purposes mentioned in section 1, viz.: 'to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, and debts, &c." "In

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Pickstock v. *Lyster*, (*a*) however, it was decided that if a man assigns all his property to a trustee, *simply with the purpose of having it fairly distributed among all his creditors*, such an assignment, although it may have the effect of hindering and delaying a particular creditor of his execution, is not within the *spirit* of the act, and therefore is not void, because it does not deprive any of the creditors of *his fair share* of the debtor's property, if he chooses to become a party to the deed. The deed in *Owen* v. *Body* differed from ordinary deeds of this sort, on the ground that it was not simply an assignment for equal distribution, but one by which each creditor was to participate in the proceeds only on condition of his assenting to the trustees carrying on the trade as they pleased, until interrupted by the major part of the creditors. The observation of Lord *Denman*, which my brother *Miller* professes not to understand, 'that the deed imposed such terms as might have constituted a partnership among the parties executing it, and those were terms to which creditors were not bound to submit,' means no more than this: *that the deed before them was not such a deed as it was reasonable to expect a creditor willing to take his fair share of the debtor's property to accede to;* just as an offer of payment accompanied by a requisition of a receipt in full of all demands, is not such a tender as the creditor is bound to accept, that is, his position is not deteriorated by his rejection of it. In that case there were large provisions for carrying on the trade, and the creditors were to look for the future profits."

Judgment.

I have cited these observations at length, because it appears to me they are extremely just and forcible, and are well worth recurring to in all discussions upon such questions as that now before us.

In the case in the Exchequer of *Coates* v. *Williams*,

(*a*) 3 M. & S. 371.

which followed soon after *Janes* v. *Whitbread*, the court upheld a similar assignment against the same objection, distinguishing the case from *Owen* v. *Body*, and finding no fault with any thing that had been decided in that case.

In none of these cases was a doubt expressed, that if the creditors were by the deed made partners with the trustees, and if that were a consequence which creditors willing to take their fair share of the debtor's property could not be expected to accede to, the insertion of such terms in the deed would make it void under the statute 13 Elizabeth, ch. 5, and deprive it of the support of such cases as *Pickstock* v. *Lyster;* which case, it may be noted, certainly contained no provision for releasing the debtor from his debts. No express authority seems to have been cited in support of the position, that the insertion of an unreasonable stipulation in the deed would render it invalid. The court seems in *Owen* v. *Body* to have taken that ground upon reason and principle, and from that time to the present it seems to have been acquiesced in.

Judgment.

In regard, however, to the first point decided in *Owen* v. *Body*, namely, whether the deed made the executing creditors partners in carrying on the business that was provided for under it—though *Owen* v. *Body* can perhaps not be said to have been overruled, its authority has lately been greatly shaken by the decision in the House of Lords of the case of *Cox* v. *Hickman*, an action instituted in the Court of Common Pleas.

That case put the soundness of the decision in *Owen* v. *Body* on the question of partnership or no partnership to a severe test, for assuming that the deed of assignment did in that case make the creditors partners, an action was brought against two of the executing creditors, on the ground that they were liable as partners

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upon bills of exchange drawn upon and accepted by "The Scranton Iron Company," under which name the trustees in the assignment carried on a business provided for in the assignment for the benefit of the creditors of the debtor who made it. The deed as regarded this feature of it scarcely differed, if at all, in its nature from that in *Owen* v. *Body*, and the four very learned judges of the Court of Common Pleas who heard the argument, Lord Chief Justice *Jervis*, *Creswell*, *Williams*, and *Willis*, JJ., after taking time to deliberate, held the case to be undistinguishable from *Owen* v. *Body*, as regarded the question of partnership, and on the authority of that case directed a verdict to be entered for the plaintiff.

The judgment was appealed from, and in the Exchequer Chamber, and after a very long and learned discussion before six judges of the Queen's Bench and Exchequer, and many months taken to consider, three of the learned judges held that the creditors were liable as partners, and three held that they were not.

Judgment.

The court being thus equally divided the judgment given below was in effect affirmed, and after some hesitation as to the right to carry the case further, there was an appeal to the House of Lords, where the point of partnership was again argued very fully, and upon a question put to the learned judges—the six who were in attendance were equally divided in opinion, and the law lords present, viz.: the Lord Chancellor, Lord *Brougham*, Lord *Cranworth*, Lord *Wensleydale*, and Lord *Chelmsford*, were unanimous in holding that the creditors were not liable as partners, and so they reversed the judgment of the Court of Common Pleas, though it had received the concurrence of a large majority of the judges who had dealt with the question in its different stages.

The case is remarkable for the difference of opinion,

and the unsettled state of the law which it exhibits, not only upon the main question, but upon several points which are incidently discussed.

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The judgment of the House of Lord did not go the length of over-ruling the judgment in *Owen* v. *Body*, even upon the legal question of partnership, but proceeded rather upon an alleged difference between the two assignments, though it must be admitted, I think, that in the result of all these discussions the authority of *Owen* v. *Body* upon the question of partnership or no partnership has been greatly shaken.

But I do not perceive that since that case was decided any fault has been found with it, so far as it determined that if the creditors executing would be liable as partners for debts to be incurred in carrying on the business; that would fully justify the creditors in declining to execute the trust deed, and that it should follow as a consequence that the creditor so refusing could enforce his execution against the goods, notwithstanding the assignment. Lord *Cranworth*, who went fully into the case in the House of Lords, and whose judgment is to my mind one of the most satisfactory, speaking of *Owen* v. *Body*, says, "It was at most a dictum," (alluding to the observation of Lord *Denman*, that the deed imposed such terms as *might have* constituted a partnership among the persons executing it—not pronouncing that it did,) and he adds, "The Court of Queen's Bench were quite right in holding that the creditors were justified in refusing to execute the deed tendered to them, and that was all that was decided." His lordship meant, no doubt, that that was all that was decided in the case, *which touched the question of partnership*, for there was this certainly decided in the case, which does not appear since to have been disputed —that as the deed imposed such terms as *might* have constituted a partnership, "those were terms to which

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creditors were not bound to submit, and that the assignment was therefore invalid." (*a*)

Lord *Wensleydale* is equally explicit on this point. "The case of *Owen* v. *Body*," his lordship said, "on which some reliance was placed, is really no authority for holding that the creditors by subscription became actual partners. In the short judgment of Lord *Denman* the expression used is not that the deed imposed such conditions as would have constituted a partnership amongst those who subscribed it, but as *might have had the effect*, which is a much more doubtful expression. It was quite enough for the decision of that case that the subscription exposed them to the peril of being considered partners, of which peril the opinions of the majority of the judges leave no doubt, *and that prevented the deed from being a fair deed, and good against creditors.* So did the provision that the effects which ought to have been divided equally amongst the creditors should be put in peril by being employed in trade."

Judgment.

I have gone into this long, and, I fear, tedious statement of the discussions and judgments in this much agitated case of *Cox* v. *Hickman*, not because the question of a partnership in fact, upon which alone the case necessarily turned, has any bearing upon the case now before us, but for the purpose of shewing that the correctness of what was decided in *Owen* v. *Body*, which has a direct bearing upon the present case, is no more called in question in this latest judgment of *Cox* v. *Hickman*, than in the other intermediate cases to which I have referred, but that it seems to be still recognised fully, and with no intimation of a doubt, that is, that even the peril of being considered partners in consequence of a provision contained in that assignment, made it a deed which the creditors generally could not be expected to sign, and that, in the words of Lord *Wensleydale*, "pre-

(*a*) See 5 A. & E. 37.

vented it from being a fair deed and good against creditors."

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Connecting, then, this deduction from the class of cases I have been referring to with what was so well expressed by *Maule*, J., in *Janes* v. *Whitbread*, in the passage I have already cited, it appears to me that the general principle on which the court acted in *Owen* v. *Body*, instead of being in any degree shaken by the judgments or discussions in the subsequent cases, has been materially strengthened and confirmed by them, for all the difference of opinion was upon the question of partnership, which we have nothing to do with in this case.

Judgment.

Then we have here a case in which *Ranney*, who, it is clear, was at the time deeply indebted, makes, on the 4th of January, 1858, a deed to certain trustees, of something less than two acres of land in the township of Grantham, being the land for which the ejectment is brought; and the next day he executed another deed, in which the fact that he was insolvent is recited; and that he had agreed to assign *all and singular his real and personal estate* and effects to these defendants as trustees, for the benefit of his creditors; and that in pursuance and part performance of the agreement, he had assigned to these defendants by five several deeds, all bearing the same date, certain real estates situate in as many different counties; and it is recited that such estates were so conveyed to the defendants (though not so expressed in the said indentures) upon the like trusts, and for the like purposes, as those for which he did by the same deed of the 5th of January, 1858, assign all his personal estates and effects to the same trustees. And after these recitals *Ranney* proceeds by this deed to assign specifically a certain schooner by name, and certain leasehold properties in the town of Brantford, and also, all and singular the stock-in-trade, goods, wares, merchandize, household goods, furniture, bank stock, and all

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other stocks, bills, bonds, notes, accounts, judgments, mortgages, and other securities for money, debts, chattels, and other personal estate whatsoever and wheresoever, which he, the said *Ranney*, or any person or persons in trust for him, then was in any way possessed of, interested in, or entitled to—to have and to hold all and singular *the lands and tenements particularly described in the said several indentures*, and the said stock-in-trade, &c., going through the same enumeration, debts, chattels, and other personal estate in trust, &c., setting out such trusts as are usually found in assignments of this kind. The assignment contains a long list of debts, which are to be paid in full before any dividend is paid to other creditors. No objection has been taken on account of these preference claims. But we have been asked to hold the assignment invalid as against the plaintiffs in this action, on account of the following provision at the end of the deed: "And the said parties of the third part, (that is, the creditors executing the deed,) for the consideration aforesaid, do severally, for themselves and their respective partners, release unto the said party of the first part (the assignor) all manner of action and actions, bonds, notes, bills, judgments, executions, and all other claims and demands whatsoever, from the beginning of the world to the day before the date hereof: provided always, that every such creditor as shall not come in and execute these presents within 30 days from the date thereof, shall not be entitled to any distribution or advantage therefrom whatsoever; and in such case the proportion or proportions of the premises hereby assigned, which such creditor or creditors would have been entitled to receive if he had executed the same within the time aforesaid, shall be paid over to the said parties of the third part in proportion to their respective debts.

Judgment.

"And it is lastly agreed, that when the said parties of the third part shall have received the whole of their respective debts, and all charges, commissions, and

allowances shall have been deducted from the said trust moneys, the said parties of the second part shall deliver and pay over the remainder, if any, to the said party of the first part, his executors or administrators."

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Now, in the first place, independently of any thing that can be cited as authority bearing upon the question, is this a reasonable and just provision which subjects all creditors of *Ranney* to these conditions before they can gain a right under the deed to share in the proceeds of the real or personal property assigned—first, that they must execute the deed within 30 days; and secondly, that they must consent to accept in full of their debts whatever dividend may fall to them, according to the terms of the deed; and must, in consideration of their expectations under the deed, release *Ranney* from all debts due to them at the date of the deed? Our statute 22 Vic., ch. 96, sec. 19, against fraudulent preferences, cannot affect this case, because it was passed after the assignment was made. There are many cases which would seem to warrant us in holding that, at common law, *Ranney* would have been at liberty to do what he did by this deed, notwithstanding it had the effect of giving to some of his creditors a preference over others; and that he would have been equally at liberty to do this notwithstanding the statute 13 Elizabeth, ch. 5, provided his assignment was not a fraudulent contrivance to keep off creditors, and made upon some secret trust or reservation in his own favour. (*a*) But although he might, no doubt, consistently under the common law, and with that statute, have transferred his property directly to one or more of his creditors, or as much of it as might be necessary for payment of his or their debts, yet, if the law is correctly laid down by the learned judges, in *Janes* v. *Whitbread*, an assignment to trustees, for the payment of debts would not be legal, and could not have the effect of tying up his property so as to protect it

Judgment.

(*a*) 1 M. & Sel. 395; 3 M. & Sel. 375.

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against execution creditors, unless it was made simply for the purpose of having it fairly distributed among all his creditors.

And in reason it would certainly seem to follow, that an assignment should be held to be invalid which provided that a large body of creditors should be paid in full out of the proceeds, before the other creditors should receive any dividend; for this might end in their receiving little or nothing out of a large property; and which, moreover, allowed no creditor to participate to any extent in the proceeds of the goods assigned, unless he would be content to confine himself to what he should receive under the trust, and to release his debtor from all claim. But after all, if we look at what the statute 13 Elizabeth, ch. 5, does prohibit, and according to its recital it was intended to prohibit, and if we consider further, as I think we must, that the statute was intended to go at least as far as the common law was understood to have gone before in restraining alienations to the prejudice of creditors, then we must conclude that it was only "*feigned, covinous, and fraudulent conveyances*, contrived of malice, fraud, or guile, to delay, hinder or defraud creditors," that were intended to be interfered with. It would be seldom that an assignment would be found to contain upon the face of it what, without the aid of extrinsic evidence to be submitted to a jury, would warrant a court in holding it to be fraudulent. That it placed one creditor in a more favoured position than others, would not, I conceive, be sufficient, for there might be reasons which would shew that to be perfectly just and honest.

Judgment.

Then would it seem just and right on principle to hold that a conveyance like this to trustees was upon the face of it a conveyance fraudulently devised to defeat or delay creditors, because of the provision which required from all creditors who should execute it a release in full of all demands against the debtor? I think not, without

something more appearing to show fraudulent conduct or intention than the deed itself exhibits.

It is too late to contend, in the face of a multitude of authorities, and of the principles sanctioned by all bankrupt and insolvent acts, that an insolvent debtor who has been guilty of no fraud, and who honestly surrenders every thing that he has, may not fairly expect to derive from the surrender the advantage of being secure from molestation afterwards on account of his then existing debts. His exacting a discharge in full therefor, however much or little the property which he has surrendered may produce, cannot be deemed a fraudulent condition, provided he has surrendered all, and has been guilty of no deception.

Each case must stand upon its own merits, as they are made to appear in evidence. The fraudulent intent and effect of the assignment may be so apparent upon the evidence or even upon the face of the assignment without the aid of other evidence, that it would be the duty of a judge to tell the jury that it was one so manifestly fraudulent that the law would not uphold it; in which case the calling upon the jury to pronounce upon it would be rather form than substance. Judgment.

In the present case, *Ranney* assigned all his personal property to trustees, in terms as comprehensive as could be employed. He recites in his deed that he had agreed and intended to assign *all* his real estate; but all that he has in fact done in this respect is to convey to his trustees certain real estate. For all that the deed states, what he has conveyed may be all that he owned, or it may be but a part of it, and a very small part.

If the latter had been shown to be the fact, then his exacting a release in full, notwithstanding his failure to surrender some considerable portion of his property, would have been manifestly unfair and unreasonable.

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So also, if what he was surrendering [illegible] small value in proportion to his debts, and if he were known to be in possession of a large income derived from official sources, or from funds abroad, it would have been a fraud upon his creditors to endeavour to place beyond the reach of execution his tangible property, and to deprive them at the same time of all claim to be paid a dividend out of his property assigned, unless they would release him from the debt in consideration of what they might receive from the trustees. A. might be indebted to B. in £50, and to others in £1,000, and might have only £500 worth of property in this country which an execution could reach, but a large income derived from other sources. If he should endeavour to place his property out of the reach of B. by assigning it to trustees, on the condition that no creditor should be paid anything who should not consent to discharge him in full, I think a jury might fairly be told that such a deed was a fraud upon creditors, and void under the statute.

Judgment.

But fraud is not to be presumed, and we are not at liberty to act upon the mere surmise that *Ranney* might have owned real estate which he had not conveyed, or other considerable means of paying his debts, besides the property which he had placed in the hands of the trustees. The reasonable inference from what appears, and in the absence of any evidence leading to a contrary conclusion, is, that he gave up all his means of satisfying his creditors.

Still it is to be considered that an assignment of this kind, voluntarily made to assignees selected perhaps wholly by himself, might afford a very uncertain and unsatisfactory provision for the due application of all his assets to the satisfaction of his debts, and that a creditor might very naturally and reasonably object to being a party to the assignment, if he must rest his hope of being satisfied entirely upon the contingency of the debtor honestly giving up all his effects, and of the trustees diligently realizing and faithfully applying

them; and it seems hard that he should be deprived of any benefit under the deed, unless at the same time he gives up all hope of ever obtaining more than the deed will give him. On the other hand it is to be considered that few, if any, persons would make an assignment for the benefit of their creditors, if the exacting a release would necessarily invalidate it; for the consequence would be that they generally would be frustrated by a portion of the creditors refusing to come into the assignment, and pushing their remedy by execution against the goods, for this would wholly defeat the object of the debtor, and of those creditors who had been content to rely upon receiving their fair dividend.

This, no doubt, has led to the general introduction of a release clause into assignments of this nature and of its being tolerated, as it appears to have been by the courts; that is, I mean, tolerated where there is nothing in the circumstances of a particular case to make that an unjust or unreasonable condition, which has been generally allowed to be imposed. When I say that such a condition had been generally allowed and that assignments have not been held invalid on account of it, I accede to the correctness of the view taken in the judgment of Mr. Justice *Hagarty*, delivered in this case—I mean as regards the state of the English authorities upon this question. Judgment.

The only case in which a decision seems to have been called for upon this exception to the assignment containing a clause of release is that cited in the judgment below, of the *King* v. *Watson*, (*a*) and there the court entered into no discussion of the exception, but in general terms said—the assignment (by which we must suppose them to mean, such as it was) "was a very common arrangement, which it would be very injurious to disturb." The deed had been set out at length in a plea, with the condition plainly expressed, that the creditors

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were to receive the moneys arising from the insolvent's estate in full satisfaction, and discharge of their respective debts.

This plea was specially replied to by the plaintiff, who contended that it was fraudulent and void, and in the argument the clause of release was strongly pressed as one that made the deed void. The court, therefore, could hardly have failed to give their consideration to that point, when they held, as they did, that there was no fraud in the case affecting the assignment.

In the case of *Owen* v. *Body*, the assignment contained a clause of release and sale; the present Chief Justice of the Common Pleas, though he objected as counsel for the execution creditor to the validity of the assignment on other grounds, raised no question about the release. In the case of *Hickman* v. *Cox* also, the deed as set out in 18 C. B., 626, contained a similar clause of release. The validity of the assignment was not in question in that suit, and I only mention it to shew that it seems to be the universal practice to insert this clause.

Judgment.

In *Tatlock* v. *Smith*, (*a*) this matter of a release in an assignment came up incidentally, the debtor having refused to execute the assignment because it did not contain such a clause of release as he deemed sufficient. The Chief Justice—*Tindal*, I believe—who tried the case at Guildhall, said he thought the defendant's objection to execute the conveyance was reasonable. The defendant had insisted that a general release from the creditors was a usual and reasonable clause.

Afterwards, in *banc*, the learned Chief Justice remarked,—"It is unreasonable that debtors who have surrendered so much, and have thereby deprived them-

(*a*) 6 Bing. 339.

selves of any other mode of effecting payment, should remain liable to hostile proceedings at the suit of their creditors. Their situation itself seems to preclude the possibility of any such intendment." 1862. Bank of Toronto v. Beeles.

"I do not say," his lordship remarked, "that an absolute refusal to execute the conveyance, as it stood, might not have remitted the creditors to their rights, but in the present case it is only necessary to observe that there is no evidence of a sufficient tender of any release." His lordship, we may suppose, would hardly have held this language if he had looked upon a clause of release as inconsistent with the validity of the assignment. In *Wells* v. *Greenhill*, (*a*) *Abbott*, Chief Justice, in his judgment gives us to understand that he did not regard either the giving preference to certain creditors by directing their debts to be paid in full, or the insertion of a clause of release, as affecting necessarily the validity of an assignment. The deed the court then had before them directed that before any dividends to other creditors, a judgment debt of £400 due to *Stoveld & Upperton* should be paid in full. The deed contained a proviso that in case any creditor whose debt should amount to £100 and upwards, or any two creditors whose debts should amount to £150, or upwards, should not execute the deed within three months, the deed should be void. And it also contained a covenant that the creditors who executed the indenture would release all their claims upon the assignee within a certain time. It was contended, that as *Stoveld & Upperton* were creditors to an amount above £150, and had not executed within the time, the deed was therefore void. The court said,—"If *Stoveld & Upperton* had executed the deed, they would have been parties to the latter covenant, and the effect of that would be to make them covenant to release that debt, which by the provisions of the deed was to be paid in full." I have thought it worth while to refer to these two cases, in addition to the summary of English

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(*a*) 5 B. & Al. 369.

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authorities so ably collected and observed upon in the court below—because they shew that the fact of the clause of release being in the assignment came particularly under the notice of the court, and was remarked upon. In the judgment delivered by Mr. Justice *Hagarty*, the state of this question upon American authorities is, I think, correctly explained, as well as what has passed hitherto in this country, when questions have been raised in regard to the effect of these clauses of release in assignments for the benefit of creditors. I mean, their effect upon the validity of the assignment as against non-executing creditors. We had, in the cases referred to in the judgment, expressed more than a doubt of the propriety of upholding assignments containing such a clause; but it so happened that there being in those cases other objections to the assignment, which we felt bound to sustain, it had not been necessary to the disposal of the cases that we should rest our judgment upon the point in question, and in *Burritt* v. *Robertson*, (*a*) as in *Maulson* v. *Topping*, (*b*) I felt it proper to intimate, that I still entertained some doubt as to what our decision might be in any case where the case might turn exclusively upon it.

Judgment

Upon the consideration which we have since given to the matter in this case, I am persuaded we should not be warranted in departing from the conclusion come to in the Court of Common Pleas. I will mention that the attention I have bestowed upon the present case has satisfied me of the general soundness of the views expressed by my brother *Burns* in the case of *Taylor* v. *Whittemore*, (*c*) referred to with approbation in the judgment given in this case in the Court of Common Pleas.

In my opinion, the judgment given below should be affirmed, and the appeal dismissed with costs.

(*a*) 18 U. C. Q. B. R. 555. (*b*) 17 U. C. Q. B. R. 183.
(*c*) 10 U. C. Q. B. R. 440.

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BURNS, J.—The case of *Burritt* v. *Robertson* was governed by the new statute 22 Vic., cap. 96, though the previous cases of *Kerr* v. *Wilson* (*a*) and *Maulson* v. *Topping* were mentioned by myself as sufficient to dispose of the question with respect to a release of the debtor by the creditors, introduced in an assignment made for the benefit of creditors. It becomes necessary now, upon this appeal, to decide the precise point, though in the cases cited, as will be seen upon the facts of each, it was not necessary to decide the precise question—that is, the point was not in either of them the sole question upon which the case turned.

In addition to those cases in the Queen's Bench to be reviewed, there is also the case of *McDonald* v. *Putnam*, decided in the Court of Chancery by my brother *Esten*, wherein he held that the provision in a deed made for the benefit of creditors, where there were provisions for giving some creditors a preference over others, rendered the deed void. I believe these cases are all which, in our own courts, are to be found upon the precise subject before the court.

Judgment.

Looking at the cases in the American courts, where no system of administering estates of bankrupts or insolvents exists, we find the opinions of judges and of courts very conflicting. Each of the states of the Union holds itself bound only by the decisions of the particular state, therefore we occasionally find some subject upon which the decisions of one state conflict with those of another state. The earliest case, in point of time, I find upon the subject is that of *Lippincott* v. *Barker*, (*b*) in 1809. This case was before the Supreme Court of Pennsylvania, and the deed of assignment gave no preference to any particular creditor, but provided for all rateably who should within a certain time execute a general release of all demands. The court was not unanimous, and those judges who gave the decision did

(*a*) 17 U. C. Q. B. R. 168.

(*b*) 2 Binney, 174.

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so on the particular facts of the case, and remarking that there were many and strong objections to deeds of assignment made without the privity of creditors, and excluding all who do not execute releases. After the execution of the deed in that case, the greater body of creditors met, and accepted of the assignment before the writ of execution of one of the creditors came into the hands of the sheriff. The deed was upheld. In 1818, in the Circuit Court of the United States, embracing the state of Pennsylvania with New Jersey, I find Judge *Washington* deciding the question in favour of the assignment. (*a*) There the deed of assignment provided for payment rateably to all those who should execute a release within a specified period, giving them of course a preference; and of course those who did not release would be left to obtain what they could from the insolvent, if he had any thing. In 1833 a case of *Brashear* v. *West*, (*b*) was brought upon appeal to the Supreme Court of the United States, and the judgment of the court was given by Chief Justice *Marshall*. In this case the deed provided for a preference to particular creditors, who were to be paid in full before others shared in the estate, and all creditors who did not execute a release within a certain time were to be excluded all benefit. The deed was executed in Pennsylvania, and it seems had not been questioned in that state, but was questioned in another state. The court upheld the validity of the assignment, upon the ground that as the courts of Pennsylvania had so decided in the two cases I have quoted, those decisions must be received in the courts of the United States, and be acted upon.

Judgment.

Thus I find the courts of the state of Pennsylvania and the Supreme Court of the United States upholding the law of that state to be, that a deed of assignment will be upheld where made for giving preferences to

(*a*) Pierpont v. Graham, 4 Wash. 232. (*b*) 7 Pet. 608.

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those creditors who will grant releases of their demands, and holding *that* to be so even though the deed provides for discharging the demands in unequal proportions. The criterion of the validity being the fact that the debtor has surrendered all his property for the benefit of his creditors, it is of no consequence that he should say in doing so that he exacted a release in full, that the one may be treated and taken to be a valid consideration for the other. As no bankrupt or other law compels an equal distribution of a man's property, he may dispose of it in satisfaction of his debts in any order and upon any terms he thinks proper.

Turning from the state of Pennsylvania to the courts of the state of New York, we find a different opinion enunciated, but still not such a decided and clear one that leaves the mind free from doubt as to what may ultimately prevail even in that state. The Supreme Court in 1817, in *Hyslop* v. *Clarke*, (*a*) held that a deed made to satisfy one creditor first, and then to pay the others proportionably on condition of their executing releases of their respective demands, was void. Chancellor *Kent*, in 1821, in *Seaving* v. *Brinkerhoff*, (*b*) held that a deed conveying a portion of the debtor's property only to satisfy debts, and containing a release to the debtor, was a provision the creditor was not bound to submit to. He said, "A partial assignment upon such a condition is pernicious in its tendency, if it be not, as I rather apprehend it to be, fraudulent in its design." In 1823 the Supreme Court, in *Austin* v. *Bell*, (*c*) held that a deed providing for the shares of such of the creditors as refused to sign a release of their demands being paid over by the trustee to the debtor, was void under the Statute of Frauds. The court says, without in the least impugning the doctrine that a man in debt has a right to give a preference to creditors, yet that a deed which does not fairly devote the property to the

Judgment.

(*a*) 14 John. 458.
(*b*) 5 John. C. C. 329.
(*c*) 20 John. 442.

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payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe, is in law fraudulent and void as against the Statute of Frauds, being made with intent to delay, hinder, or defraud creditors of their just and legal actions.

In 1833 the Court of Errors in *Grover* v. *Wakeman*,(*a*) upon appeal from Chancellor *Walworth*, affirming his judgment, held that an assignment containing a provision giving a preference to certain creditors in the distribution of the property, to depend upon the execution by them of a release to the debtor of all claims against him, was void. The court consisted of no less than twenty members, and were divided in opinion, five holding that the deed was not void in consequence of such a stipulation. The deed provided for the payment in full of certain preferred creditors, and for the second class who should within a certain time agree in writing under seal to receive such proportion of their debts respectively as could be paid by the avails then remaining in the hands of the trustees, in full discharge of their respective claims, to be apportioned according to their respective debts.

Judgment.

In 1844 the Supreme Court, in *Goodrich* v. *Downs*,(*b*) speaking of *Grover* v. *Wakeman*, says: "Until the Court of Errors is prepared to retrace its steps, this question must be regarded as finally settled." Chancellor *Kent*, in the 6th edition of his Commentaries, published in 1848, (vol. 2, p. 536,) in the note, says of *Grover* v. *Wakeman*, this appears to be the most stern decision that exists either in England or this country on this subject." He adds his own opinion as the result of his investigation, thus: "The weight of general authority, both English and American, is, that an assignment by a debtor of all his property for the payment of his debts, and at the same time giving preferences, and requiring

(*a*) 11 Wend. 187.

(*b*) 6 Hil. N. Y. 441.

an absolute release from each creditor who accedes, is not *per se* fraudulent and void. The circumstances of the debtor assigning over to trustees all his property, without any reservation to himself, and giving the surplus, if any, to those creditors, if any, who do not come in and agree to release on taking their preferred share, is deemed to disarm the transaction of all illegality and unfairness."

The Supreme Court of Errors of the State of Connecticut, in 1826, *Ingraham* v. *Wheeler*, (*a*) followed the decision of *Hyslop* v. *Clarke* and other cases, and held, that a deed for paying certain creditors in full, and then providing as follows:—"All the rest and residue of said proceeds, if any there be after the payments aforesaid, shall be applied by said assignees to the payment in whole or in part of the claims and dividends of all other of the creditors who shall within, &c., discharge their said claims and demands; and it is hereby expressly understood that no creditor shall be entitled to receive a dividend of the proceeds aforesaid, until he shall have signed such discharge"—was fraudulent and void. Judgment.

In the State of Massachusetts, before Mr. Justice *Story*, in the circuit court of the United States, in 1826, a deed of a similar character was upheld in the case of *Halsey* v. *Whitney*. (*b*) Mr. Justice *Story* ably reviews the authorities, both American and English, up to that time, and speaking of those of his own State, he says, "The decisions in Massachusetts, therefore, leave the question *in equilibrio*." He sums up the whole, and gives his own opinion thus: "The weight of authority is then in favour of the stipulation, for the decisions in New York, (that was up to 1826,) did not turn upon the naked point of a release, but upon that as incorporated into a peculiar trust, I am free to say, that if the question were entirely new, and many estates had not

(*a*) 6 Conn. R. 277. (*b*) 4 Mason, 206.

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passed upon the faith of such assignments, the strong inclination of my mind would be against the validity of them. As it is, I yield with reluctance to what seems the tone of authority in favour of them." Mr. Justice *Story* reiterates his view as to the tone and weight of authority upon this point in his "Commentaries upon Equity Jurisprudence," so widely circulated, and so justly celebrated both in England and America.

Many other cases before courts in other States of America, might be added to those I have mentioned, some taking one view, and others a different view; but I deem it quite sufficient to notice those of the four States mentioned only, and two of these particularly on account of the eminent jurists who have considered the question.

Judgment.

In *Jackson* v. *Lomas*, (*a*) the deed of trust, made for the benefit of creditors, contained a clause of release by the creditors to the assignor, with a proviso that in case any of the creditors should not execute the deed on or before the 26th July then next, the assignor should receive from the trustees the shares of those creditors, and that no creditor should be entitled to the benefit of the trust deed who did not sign before that day. The plaintiff did not sign until the 31st July, and he refused to sign until the assignor had agreed to make good the deficiency. And it was upon this agreement he sued the assignor. The court held this agreement fraudulent as respects the other creditors; but not a word was urged against the validity of the trust deed. It seems to have been taken for granted that the trust deed was valid. If it had been void on the ground of imposing terms which the creditor was not bound to submit to, there would have been nothing in the way of the plaintiff sustaining his action upon the original debt, for there was a count in the declaration to that effect.

(*a*) 4 T. R. 166, (1791.)

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In *The King* (in aid of *Braddock*) v. *Watson*, (*a*) the very point was raised, and argued upon such a clause in the deed; but the court of Exchequer said, "There is certainly no fraud in this case affecting the assignment, which has been made for the equal benefit of all the creditors, *Braddock* as well as the rest." The court adds, "This is a very common arrangement, which it would be very injurious to disturb, where there has been no commission." The case of *Pickstock* v. *Lyster* had then just recently been decided; and Baron *Richards*, remarking upon that case, as applicable to *The King* v. *Watson* says, "Such a deed certainly ought not to be avoidable by any particular creditor not attempted to be excluded from the benefit of it; and no such attempt has been made in the present (that is, in *The King* v. *Watson*) instance." He evidently did not consider the release clause such a coercion upon the creditor as to justify him in refusing to come in. The case of *Tatlock* v. *Smith* has a strong bearing upon the case before us. There certain traders assigned their stock for the benefit of creditors, and agreed also to convey certain real estate for the same purpose. The stock in trade was disposed of, and the business wound up, and the creditors realized 10s. in the pound. The agreement contained a provision that when the assignors should be called upon to convey the real estate, that there should be inserted in the deed *all other usual and necessary clauses and conditions*. When the deed of conveyance was tendered, the defendants objected to execute, because the deed did not contain a general release from the creditors. The plaintiffs then sued for the original debt. At the trial, before the Chief Justice, he held that the defendants' objection to convey for want of the release was reasonable; but as some of the creditors had executed the release, and a meeting had been appointed for all the creditors to determine what they would do, and the plaintiffs had commenced

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(*a*) 3 Price, 6, (1816.)

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their action before that meeting was held, the Chief Justice held the action was premature, and the plaintiffs were nonsuited. The court, upon an application for a new trial, upheld the ground that the action was premature. Sir *N. Tindal*, who had been made Chief Justice of the Common Pleas in the meantime, says: "I do not say that an absolute refusal to execute the conveyance as it stood might not have remitted the creditors to their rights; but in the present case it is only necessary to observe that there is no evidence of a sufficient tender of any release." The deed signed by some of the creditors which had been tendered, did contain a release of some kind; but the defendants considered it insufficient. It is evident, I think, that Sir *N. Tindal* considered the defendants were entitled to some kind of release, for if they were not there was no use of putting the judgment upon the ground that there was no sufficient evidence of any release, merely because some of the creditors had not signed it. And so with the judgment of the court in holding the plaintiffs were premature in bringing their action.

Judgment.

In *Small* v. *Marwood*, (*a*) the defendant, a bankrupt, had assigned his goods for the benefit of creditors to four trustees also creditors, and the deed contained a clause of release; and provided that the trustees and creditors should on or before the 1st February, then next, make proof of debts if required, and execute that indenture. A covenant followed that the creditors would not sue, and if any did the deed might be pleaded as a release. The deed was executed by two only of the four trustees, and because of that, one of the executing trustees considered the deed void, and sued out a commission of bankruptcy. The question before the court was, whether the deed was void, and whether the debt due to the trustee was a valid subsisting debt, sufficient to constitute a good petitioning creditor's debt. *Bailey*, J., delivered the judgment of the court, and it was held

(*a*) 9 B. & C. 300. (1829.)

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that the property passed to the two trustees who executed the deed. In speaking of the effect of the release of the debt he says, "I entertained a doubt for some time whether the deed would operate as a release of the debt due to *Barr*, (the trustee who sued out the commission,) unless the personal estate was handed over. But, on consideration, I am satisfied that the deed is not inoperative on that ground. *Barr* & *Hudson* have got all that the deed stipulated to give them, if they think fit to take it. The release is in consideration of the assignment; and it is therefore an operative deed. The debt was thereby extinguished, and it follows that the commission cannot be supported."

In the more recent cases of *Janes* v. *Whitbread*, and *Coates* v. *Williams*, the deeds of assignment contained the clauses of release to the debtor, but no question was made to the court about that provision making void the deeds; and yet it is obvious, that if it had been considered that such a provision would avoid the deeds, the point would have been taken. I think we must take it for granted the profession in England did not suppose that point an open question at that time, and we can scarcely think the profession there were ignorant of the views entertained upon this side of the Atlantic, especially as Mr. Justice *Story's* works are accepted there as standards.

Judgment.

Some of the cases cited, and many others which might be mentioned, were cases of traders providing for an equal distribution of their effects among their creditors; and it may be said the case before us provides for an unequal distribution among *Ranney's* creditors, and therefore stands upon a different footing. If this question were propounded for the first time—that is a debtor claiming a release of debts due by him, or providing for the exclusion of such creditors as refused to accept of the assignment upon those terms, I think I should hold that it was a stipulation so far for the benefit of the

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debtor that would render the deed void under the Statute of Frauds; but when I see that in cases of traders the courts in England constantly uphold these assignments, containing releases by the creditors, whereon the deed itself is not avoided, on the ground of the deed itself being an act of bankruptcy: and when I see that in cases of persons not traders, the courts constantly say that a person may select any class of creditors, or any particular creditors, and pay them to the exclusion of all others, and that the only question is, whether the debtor has honestly given up his property to his creditors, then I am forced to the conclusion that the tone of authority is that the provision for a release being given on the one side, is the consideration for surrendering the property by the debter upon the other side. If the transfer of the property can be held to be done for a legal consideration, then, of course, the case does not fall within the Statute of Frauds.

Judgment.

There is a provision in the deed before us not common in these assignments, and that is, in case any of the parties of the third part do not, within the time specified, come in and execute the deed, then the shares which such creditors would have received shall be paid over to those creditors who do execute the deed.

At the time the deed in this case was made, the law of Upper Canada remained the same as it was when *Taylor* v. *Whittemore* was decided, persons who were traders, and those who were not traders being upon the same footing, and also leaving a debtor the power of saying in what order he would pay his creditors with his property. No doubt it is true that very many deeds of a similar character to the present have been executed and acted upon, and much real and personal property have changed hands under them, and I should say under the idea of the profession generally, there was no fraud apparent upon the face of such deeds. Perhaps it was unfortunate that the point has been suggested, and that

opinions to the extent they have been should have been given; and then, again, perhaps it is fortunate, in order to settle the law, and leave no doubt upon past transactions.

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I think, therefore, the judgment should be affirmed.

SPRAGGE, V. C.—My brother *Esten* and myself agree, generally, in our views as to the law upon the point principally in question.

It is of course conceded that the debtor had, as the law stood at the time this assignment was made, the right, although he was insolvent, of preferring one or more creditors to others. His doing so did not contravene the statute of Elizabeth; it is not hindering or delaying his creditors within the meaning of the statute. What has been done by this assignment is to give a preference to creditors, large in number, and, as I should judge, large in amount, leaving the surplus, if any, to be divided rateably among the other creditors, and imposing a condition to their receiving such rateable share that they shall release the debtor.

Judgment.

It is admitted that in the absence of authority such a deed is void under the statute; it imposes such an unreasonable condition upon those who may come in after the preferred creditors as to be a hindering and delaying of them.

It is not unreasonable if an insolvent transfer to trustees all his assets for the general benefit of his creditors, that he should require in return that they shall grant him a release. This is in the spirit of the Bankruptcy Laws, and if there be some exceptions to the assets being for the general benefit of all creditors, it may still be not unreasonable, and still within the spirit of the Bankruptcy Laws; but that I apprehend must depend upon the extent to which the exception is carried. The law recognises certain preferences as

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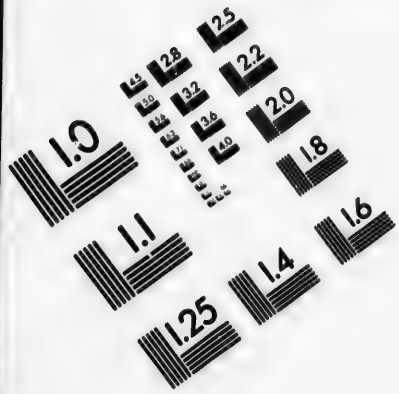

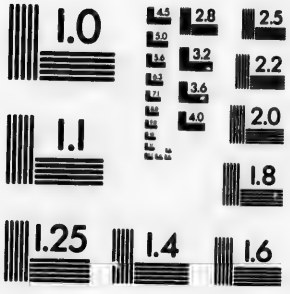

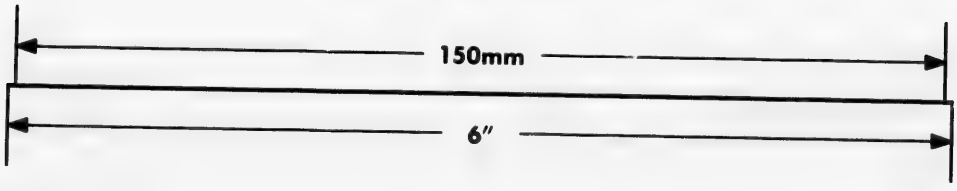

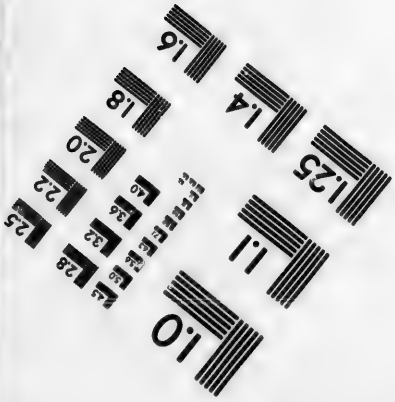

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reasonable and right, and does in bankruptcy prefer certain creditors; and if the like preferences are given in a voluntary assignment, there is no reason, that I can see, why they should be held to invalidate the deed; for that which is in accordance with the policy of one statute cannot be said to be a fraud under another; and it may probably not be necessary that the preferences should be precisely the same as obtained in bankruptcy, if they are substantially in the same spirit.

So far the court would have something tangible to go upon, in holding such assignments not avoided by the statute of Elizabeth. But when an insolvent discards altogether that which is recognised as just and equitable in bankruptcy, and chooses to substitute his own caprice, or to consult his own personal or family advantage, and to postpone to these considerations the just rights of creditors, he places himself, it seems to me, out of the protection of the principle upon which assignments are upheld. which provide for a rateable distribution wholly, or with such preferences substantially as obtain in bankruptcy.

Judgment.

It must surely be competent to the court to draw the line somewhere; otherwise the court must feel bound to uphold whatever disposition an insolvent may make of his estate by assignment, however unreasonable or unjust. If the insolvent does not stipulate for a formal release to himself, the creditor is in a very different position, because, with the debtor's right to prefer one creditor over another, he might be content to come in, although the preferences might be unreasonable, because he might get something under the assignment; and at all events his position as to his debtor otherwise would not be prejudiced, but with a clause of release his position is very different. He may get something, or he may get nothing, for all may be absorbed by the unreasonable preferences given, and it is generally impossible to tell before hand how the estate may turn

out. This alternative then is presented to him, to become a party to an instrument which unjustly prefers others to himself, and at the same time to forego all other claims against the debtor's estate, or not to come in at all. I cannot help feeling strongly that such an assignment does hinder and delay creditors within the spirit and meaning of the act; while a fair and just assignment has no such effect, but tends to promote equality of payment, and may therefore be properly upheld, even though it stipulate for a release.

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I do not think the circumstance of there being no Bankruptcy Law in Upper Canada can make a difference in favour of an unfair, unreasonable assignment. If there were no Bankruptcy Law in England, it may well be doubted, I think, whether any preference at all would not be held to invalidate a voluntary assignment, with a clause of release; but I think it would be right to uphold in Canada such assignment as came fairly within the principles of English law. But I think the assignment in question transgresses those principles in substance and in spirit, and to a degree that renders it very unjust to the general creditors.

Judgment.

There is another reason, founded upon public policy, which I think should operate against sustaining such assignments as the one in question. If an insolvent can only stipulate for a release when he makes a just distribution of his estate, he will be careful to make such just distribution; and thus equality, which the law favours, will be promoted, and a very salutary check will be imposed upon the giving of unfair and unreasonable preferences: whereas, if his assignment will be held valid, whether the distribution thereby made of his estate be just or unjust, he at the same time stipulating for a release to himself, as the price of coming in under the assignment, a powerful motive for making a just assignment will be taken away. I speak, of course, of the policy of the law, apart from the act against

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fraudulent preferences, passed since the assignment in question was made.

I do not think that the question is concluded by the authorities. They show, indeed, that a stipulation for a release does not *per se* invalidate an assignment by an insolvent, for the benefit of his creditors; but I think they do not shew that an assignment containing such stipulation, and giving unjust and unreasonable preferences, will be sustained.

In the case of *Rex.* v. *Watson*, referred to by my brother *Hagarty*, in his learned and elaborate judgment in the court below, as the only express decision in England that he had seen, there were no preferred creditors, and the circumstance is made a ground for sustaining the assignment. The language of the court is, "There is certainly no fraud in this case affecting the assignment, which has been made for the equal benefit of all the creditors." "This is a very common arrangement, which it would be very injurious to disturb, when there has been no commission [of bankruptcy."]

Judgment.

RICHARDS and HAGARTY, JJ., concurred in the views expressed by his lordship the Chief Justice.

Per Cur.—Appeal dismissed with costs. [*Esten* and *Spragge*. V. CC., dissenting.]

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[*Before the Hon. Sir J. B. Robinson, Bart., C. J.; the Hon. W. H. Draper, C. B., C. P.; the Hon. Mr. Justice McLean; the Hon. Vice-Chancellor Esten; the Hon. Mr. Justice Burns; the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.*]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

THE BANK OF UPPER CANADA v. BROUGH.

Mortgagor—Mortgagee—Sale of equity of redemption.

Held. reversing the decree of the court below, that the provision in the statute 12 Vict., ch. 73, sec. 1, (Consol. Stats. of U. C., ch. 22, sec. 357,) which authorises the sale under execution of an equity of redemption, applies only where the execution is against the mortgagor himself, and on an execution issued against his lands. [ESTEN, V C., dissenting.]

This was an appeal by the Bank of Upper Canada, the defendants in the court below, from a decree by which a demurrer put in by them had been overruled, and relief given against them. Statement.

The bill in the court below was filed by *Secker Brough*, against the Bank of Upper Canada, setting forth, that in the month of May, 1853, plaintiff purchased from Messrs. *Strachan* and *Fitzgerald* certain building lots in the city of Toronto, upon which he had made a cash payment or instalment at the time of the sale, and executed to the vendors a mortgage in fee upon the same lands, to secure payment of the balance of purchase money, being the sum of £1,012 10s., on the 25th of May, 1861, with interest thereon in the meantime half-yearly. That plaintiff subsequently sold and conveyed these lands, subject to the mortgage, to one Robinson; that Robinson afterwards sold and conveyed in like manner to *Samuel Zimmerman*, who died in the month of March, 1857, seised of the said lots, subject to the said mortgage to *Strachan* and *Fitzgerald*, and that the estate and interest of *Zimmerman* therein

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became assets in the hands of his personal representatives for the satisfaction of his debts.

The bill further alleged that *Zimmerman*, at the time of his death, was largely indebted to the defendants, who subsequently, and in the year 1858, instituted proceedings at law against his executors, and recovered judgment for a large amount, and such proceedings were taken upon such judgment that on the 27th of August, 1859, all the estate of *Zimmerman*, at the time of his death, was sold by the sheriff, under a writ of *venditioni exponas;* and that the defendants, acting through their solicitor and agent, *Clarke Gamble*, became the purchasers thereof, and immediately thereafter the same lands were conveyed by the sheriff to the defendants, subject only to the said mortgage to *Strachan* and *Fitzgerald*.

Statement.

The bill then submitted that as such purchasers and owners of the premises, the defendants were bound to indemnify the plaintiff from the mortgage, and all payments and other liabilities in respect thereof—it was their duty, from the time they became such purchasers thereof, to pay all interest as it became due under the mortgage, but that they had not done so, and that all interest thereon was in arrear since the 25th November, 1859, including the sum which fell due on that day; and that the mortgagees had called upon plaintiff to pay, and insisted upon his paying the said arrears, and had threatened to compel plaintiff to pay the principal money secured upon their mortgage when it became due.

The prayer of the bill was, that the defendants might be ordered to pay the interest accrued due, and the principal money so soon as the same should become payable.

To this bill the defendants put in a demurrer for want of equity.

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Upon argument, the court overruled the demurrer, and declared the defendants bound to pay off the mortgage, and to recoup plaintiff any thing he had paid, and ordered them to pay the same, and the costs of the suit.

From this decree the defendants appealed.

Mr. *J. H. Cameron*, Q. C., and Mr. *Bennett* for the appellants.

It is admitted that if an owner sell land which is subject to a mortgage, the vendor, being also the mortgagor, will stand in the relation of surety to the assignee or purchaser; this rule extends no further, however, and the assignee of the assignee, or a purchaser could not, under such circumstances, be looked upon as a principal for whom the mortgagor would be liable as surety. Here the plaintiff is not entitled under the provisions of the statute, or independently thereof, to the relief sought by his bill, and given him by the decree appealed from. Independently of the statute, it is not pretended that any such right accrues to the plaintiff. *Turnbull* v. *Simmons* (*a*) shews there is no power in the court to decree that the assignee of an equity of redemption shall discharge the mortgage, and no case has been found shewing that a mortgagor can compel the assignee of his assignee to indemnify him against the mortgage.

Argument.

The covenant to pay mortgage money does not run with the land. There is neither contract nor privity of estate between a second assignee of an equity of redemption and the mortgagor, unless the recent statute has worked some change in this respect. But the late act has not effected this change.

By the provisions of the act the purchaser of an equity of redemption at sheriff's sale is only subjected to the

(*a*) 6 Grant's Ch. Rep. 615.

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same liabilities that he would have been subject to in case he had purchased from the mortgagor himself. This is the utmost liability that can be established, and more, probably, than a strict construction of the act would warrant. The statute does afford one remedy, and the mortgagor, if he adopt the relief afforded by that act can have no other, this relief is an action for the mortgage debt and interest against the purchaser, in case the mortgagor has been compelled to pay the same to the mortgagee.

The facts of this case shew the propriety of the court holding that the remedy of the mortgagor is confined to what the statute expressly gives. Here the bill does not negative the existence of a covenant from *Robinson* to *Zimmerman*, to pay off the mortgage and indemnify *Zimmerman*. It may be said that this mode of proceeding is adopted to save circuity of action, and if so, then it should be shewn that each succeeding party was liable to his immediate assignee. Or let us suppose that a set-off might exist by subsequent parties as to their immediate assignee, it may be that the bank would have a complete answer to any claim which *Zimmerman's* estate could make, although no such answer might be available to the claim of any intermediate party. *Burrett* v. *Lynch;* (*a*) *Underhill* v. *Ellicombe;* (*b*) *Antrobus* v. *Davidson;* (*c*) *Yonge* v. *Reynell;* (*d*) *Jones* v. *Kearney;* (*e*) *Cox* v. *Bishop,* (*f*) were also referred to by counsel.

Argument.

Mr. *Brough*, the respondent, in person.—The plaintiff always had this remedy independently of the statute. Then under the statute; section 3, of the original act, merely expresses what the law was before, at least so far as the rules of the court of equity were concerned. It simply makes the purchaser of the equity of redemption at a sheriff's sale a debtor at law, and gives a right

(*a*) 5 B. & C. 589.
(*b*) 1 McL. & Y. 450.
(*c*) 3 Mer. 569.
(*d*) 9 Hare, 809.
(*e*) 1 Dr. and War. 135.
(*f*) 3 Jur. N. S. 499.

of action against him. All the mortgagor's equitable rights remain untouched, but in addition, a legal remedy is afforded him.

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Tweedell v. *Tweedell;* (*a*) *Cope* v. *Cope;* (*b*) *Close* v. *Wilberforce;* (*c*) *Lucas* v. *Comerford;* (*d*) *Moore* v. *Greg;* (*e*) *Moxhay* v. *Inderwick;* (*f*) *Walker* v. *Bartlett;* (*g*) *Humble* v. *Langston;* (*h*) *Fagg* v. *Dobie;* (*i*) *Tulk* v. *Moxhay.* (*j*)

Mr. *J. H. Cameron*, Q.C., in reply. If principal money not due and assignee transfers equity of redemption to another person, the liability of the assignee is at an end, and yet this decree would make a prospective charge binding upon the bank, at a time when they may have got rid of all liability.

DRAPER, C. J. C. P.—[After stating the facts of the case.]—The statute 12 Vic., ch. 73, first enabled creditors to sell the interest and equity of redemption of mortgagors of real estate in Upper Canada on writs of *fieri facias* against lands.

Judgment.

The first section authorises the sheriff upon any *fieri facias* lawfully issued against the lands of any person who may be a mortgagor, to seize or take in execution all and every (in like manner as other real estate might be seized, &c.,) the legal and equitable estate, right, title, interest and property, and the equity of redemption of such mortgagor in any lands.

The second section declares the effect of the seizure and sale to be, to transfer to, and vest in, the purchaser, his heirs and assigns, all the legal and equitable estate, &c., of such mortgagor, of the lands and tenements so

(*a*) 2 B. C. C. 101.
(*b*) 2 Salk. 449.
(*c*) 1 Beav. 112.
(*d*) 3 B. C. C. 166.
(*e*) 2 Phil. 717.
(*f*) 1 Deg. & S. 708.
(*g*) 17 C. B. 446.
(*h*) 7 M. & W. 517.
(*i*) 3 Y. & C. 96.
(*j*) 2 Phill. 774.

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seized, &c., at the time the writ was placed in the sheriff's hands, and at the time of the sale to vest in the purchaser, his heirs and assigns, the same advantages, rights, privileges and powers as such mortgagor would have had if the sale had not taken place; and provision is made that the purchaser, his heirs or assigns, may pay off any incumbrance, and shall thereupon acquire the same rights, &c., such mortgagor would have possessed in case he had made such payment, and on payment of the mortgage money to the mortgagee by the purchaser he shall be entitled to a certificate of payment and discharge which shall be of the like effect and shall be acted on as if it had been given to the mortgagor, his heirs, executors, administrators or assigns.

Judgment.

The third section authorises the mortgagee, his heirs or assigns, to purchase at such sale, &c., to acquire the same right and interest, &c., as any other purchaser might do, provided that if the mortgagee becomes the purchaser he shall give the mortgagor a release of the mortgage debt, and if any other person becomes purchaser, and the mortgagee enforces payment against the mortgagor, then the purchaser shall be compelled to re-pay the debt and interest to the mortgagor, and in default of payment within one calendar month after demand, the mortgagor may sue for the same in an action for money had and received, and until re-payment the debt shall be a charge on the lands so mortgaged and sold. These clauses are consolidated in chapter 22 of the Consolidated Statutes of Upper Canada, sections 257-8-9. It is to be observed that the words heirs, executors, administrators or assigns are not either of them used in connexion with the term mortgagor except at the end of the second section. It may be observed that section 4 of 12 Victoria, chapter 73, is not enacted in the consolidation of this act, but the provisions of the Consolidated Statute, chapter 22, are left to the General Interpretation Act, chapter 2 of the Consolidated Statutes of Upper Canada. The 12th

section of this act, the only one that can have any bearing, is not applicable, for the three sections above referred to (257, 258 and 259 of chapter 22) do not contain the word "person." If, however, I was simply construing the 12 Victoria, chapter 73, I should arrive at the same conclusion, for I do not think it would be "consistent or reconcileable with the intent and meaning" of that act to hold that when the mortgagor is described in its provisions, "*it*" (that is the description of the person) should be held to apply to the mortgagor, his heirs, executors, administrators and assigns.

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Looking at the title and the preamble, and the precise language of the original act, and using these aids for construing the Consolidated Act, as we think we are not in any way prevented from doing by the Interpretation Act, (ch. 2nd of the Con. Stats.,) we are of opinion that the enactment in question only authorises the sale of the legal and equitable estate, &c., and the equity of redemption of the mortgagor, on a judgment recovered against him and on an execution against his lands and tenements. Throughout the act, when the interest or estate of the mortgagor is spoken of, and when any reference is made to the effect of a sale, and to the consequence which under particular circumstances may follow, the mortgagor alone is referred to, and the possibility that his interest and equity of redemption may have been conveyed by him to a third party, is never apparently contemplated; tending so far at least to show that the object of the act was not to subject equities of redemption to sale under a common law execution, excepting in the hands of the mortgagor upon whose mortgage they arose, and upon a judgment against him. The act does not even provide that the equity of redemption of a deceased mortgagor may be sold for his debts, upon a judgment against either his executors or administrators, or even against his heirs in an action on a specialty debt of his, conceding that

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such an action is maintainable. It does not seem to contemplate the very possible case that the assignee by purchase from the original mortgagor of the equity of redemption might afterwards mortgage that equity for his own debt, and might have a judgment recovered against him on which an execution against his lands and tenements might be issued; he would have an equitable right to redeem arising out of his own mortgage, and the rights of the first mortgagor would also be vested in him; and yet to hold that the last created equity of redemption could be sold on a *fieri facias*, would be more like a supplementary enactment than a construction of the act in its present shape. We think it safer and more consistent with the intention of the legislature, to limit the operation of the statute to the case which its language plainly defines, namely, the legal and equitable estate, right, title, interest and property and equity of redemption of a mortgagor, on a writ of execution issued against his lands and tenements. The present bill is founded on an equity assumed to arise from the fact that the equity of redemption originally vested in the plaintiff as mortgagor of certain lands (of which he had been previously seised in fee simple) was sold and assigned by him; and that by virtue of a sale by the sheriff, on an execution against a subsequent assignee, the equity of redemption became vested in the defendants. We do not adopt this latter view of the effect of the sheriff's sale and conveyance to the Bank of Upper Canada. Without the aid of some statutory enactment it is clear that this equity could not be the subject of a common law execution, and we are of opinion the statute does not extend to a case like the present, where the judgment and execution on which the sale took place are not against the original mortgagor.

Judgment.

This is the judgment of all the judges who heard the case argued, except my brother *Esten*, who, I believe, adheres to the opinion expressed in the court below.

The decree, therefore, must be reversed and the plaintiff's bill be dismissed. 1862.

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ESTEN, V.C.—The appellants object to this decree on the grounds:—

1st. That the only remedy available to the mortgagor when the equity of redemption has been purchased at sheriff's sale is that provided by the statute, namely, to pay the debt and demand its re-payment from the purchaser, and if not re-paid to bring an action for its recovery, and to have a lien for it on the estate in the meantime.

2nd. That the relation of principal and surety has not been constituted between these parties so as to entitle the supposed surety to the relief which the decree affords him against the supposed principal.

Judgment.

With reference to the first ground it is urged, that when a statute creates a right and prescribes a remedy, that remedy and that alone can be pursued, and some cases were cited in support of that proposition the correctness of which as a general rule may be conceded. I think, however, it is a rule that prevails only at law. The proposition, I apprehend, is universally true, that when the relation of principal and surety is created, although it may be by an act of parliament creating a right and prescribing a remedy, the Court of Chancery will administer the equity of compelling the principal a *priori* on a bill *quia timet* to discharge the debt and save the surety from a suit. Thus on a bond made by principal and surety, the legal remedy of the creditor is to sue both or one, and if he sue the surety he in turn must sue the principal. Equity finds this state of things, but in order to prevent circuity or multiplicity of actions, and in order to gaurd the surety against a danger of indefinite duration, gives direct relief against the principal by compelling him to pay the debt to the

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creditor; and I apprehend if a court of equity found the same state of things, although arising under a statute, creating a new right and prescribing a remedy, it would administer the same relief. Thus, if the statute imposing the composition in lieu of statute duty, had provided that the composition should be paid by one of two parties, but if paid by one he should be indemnified by the other; I have no doubt a court of equity would compel the latter at the suit of the former to pay the composition, and save him harmless; and although the act giving a remedy by distress and therefore prohibiting an action might be thought also to prohibit a similar equity, yet I should think otherwise, and that even in this case the court would entertain the suit of the party entitled to indemnity to compel the other party to pay the composition and save his goods from being distrained; and of course the objection would not apply to a case where it was provided that an action might be maintained as in the present instance. It was then urged that if the mortgagor paid the debt and brought an action for its recovery, defences might exist to such an action by way of set-off or otherwise. This objection, I think, is much more untenable than the former. There is no possible defence that could be made at law to such an action that would not be equally available in equity to a bill *quia timet*. Nay, a court of equity would probably allow many defences which a court of law could not recognise. Equity recognises and gives effect to every legal set-off, and to many that are not legal but merely equitable. If the surety should owe a debt to the principal, he could not compel him to pay a debt for which he was surety and exonerate him without first paying his own debt. I am satisfied that there is no possible defence which could be raised to an action by the mortgagor which would not be equally available as a defence to a bill *quia timet* for payment of the mortgage and the exoneration of the mortgagor, and probably many other defences would be open to him upon

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such a bill in equity that a court of law could not allow. In fact the purchaser would have a right to insist that he could not on such a bill stand in a worse position for any purpose than if the mortgagor had paid the debt and then sued him for its re-payment. I therefore do not feel much pressed by this argument. The suit probably could not be instituted until a demand had been made upon the purchaser, and thirty days had elapsed without its having been complied with. I think much more weight is due to the point, which was not however very distinctly raised in the argument, that the relation of principal and surety was not constituted between these parties. For this position the case of *Antrobus* v. *Duncan* (*a*) was cited. In that case the suit was not by the surety but against him: that is, so far as his immediate contract was concerned, and as regards the general transaction, it was a mere dealing by one party with another through the medium of an agent, for whose acts he was of course responsible, and who in his turn was bound to indemnify the principal. But of course the equity does not apply to such a case, and if it did not apply to the principals, who were the army agents, it could not of course apply to the defendant, who was the personal representative of their surety. The important points which appear to me to arise in this case are—1st. Whether the act of 12 Victoria, ch. 73, applies to assignees of the mortgagor; and, 2nd, if it does, whether the relation of principal and surety is constituted between the mortgagor and the purchaser at sheriff's sale. The learned counsel for the appellants did not argue that the act applied only to equities of redemption in the hands of the mortgagor. Such an argument would have been fatal to his clients' title, for in such a case the sale under which they claim was void. The question does not appear to me to be free from difficulty. Thus, if the mortgagee should himself purchase he is directed to give a release of the

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(*a*) 3 Mer. 569.

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debt which could not be done to an assignee of the equity of redemption. Perhaps a more important difficulty is, that by the terms of the assignment the mortgagor may be bound to pay the mortgage debt. Such transactions are not unfrequent. In such a case if he did pay the debt it would not be just that it should be re-paid. Under such circustances, however, it is not an equity of redemption which is transferred but the entire estate, the full value of which the assignee has no doubt paid to the mortgagor, who in his turn has undertaken to discharge the mortgage. I think, however, these difficulties may be overcome, and are outweighed by the strong probability which exists that the legislature could not have intended to confine the act to cases in which the equity of redemption remained in the hands of the mortgagor, which would give the act a very limited operation, but must have meant it to extend to cases in which it had been alienated both to immediate and remote assignees. No injustice, as appears to me, could result from this construction. If the mortgagor have alienated the equity of redemption, and it were the intention of the parties that the purchaser should discharge the mortgage, then, if the equity of redemption be purchased at sheriff's sale, and the mortgagor afterwards be compelled to pay the debt, it is probably just that the purchaser should re-pay it. If, on the other hand, the mortgagor have undertaken to pay it, and have received the full value of the estate, or if any intermediate assignor have pursued this course, in which cases respectively the mortgagor or assignor will have covenanted to pay the mortgage debt; still it may be considered that the equity of redemption only passed, and may be offered for sale by the sheriff, and that the covenant for payment of the mortgage debt was collateral and to be enforced by the party entitled to the benefit of it against the party liable upon it, the purchaser at sheriff's sale meanwhile paying the mortgage debt, or re-paying it to the mortgagor, if he shall have been compelled to pay it.

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Upon the other question, whether the relation of principal and surety is constituted between the mortgagor and purchaser at sheriff's sale, I entertain much doubt. In deciding this case I assumed as a proposition universally true, that wherever, if one party paid a debt, he was entitled to be indemnified by another party, the relation of principal and surety was constituted between the two parties. I doubt the correctness of this proposition stated in this broad way. No doubt the party entitled to indemnity may properly be called a surety, and the party obliged to indemnify may be called the principal as between themselves; but I question whether it is not an essential element in a case for such equitable relief as was administered in this instance, that they should both be liable to the creditor. When the supposed principal is not liable to the creditor, it may be very true that as between him and the supposed surety he is a principal, but he cannot be the principal debtor, *quoad*, the creditor, because as to him he is no debtor at all. The practice is in such cases for the surety to bring the principal and the creditor before the court, and to compel the principal to pay the debt, and the creditor to receive it, and to deliver up the securities; but in a case where the supposed principal was not liable to the creditor, it appears to me that the creditor might demur and say he had nothing to do with him, and was not bound to receive the money from him. The question is, whether the present is not a case of that description. The act creates no privity between the purchaser and the mortgagee. The mortgagee cannot sue the purchaser. He can foreclose his equity of redemption, but he cannot sue him for his debt. The purchaser is not liable to the mortgagee, and the liability of the estate in his hands would appear insufficient to constitute the relation which is necessary to found the equitable relief administered in such cases. It would seem that if relief is to be given to the mortgagor in such cases it must be on another principle, namely, that as the act has provided that if the mort-

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gagor shall be compelled to pay the debt the purchaser must re-pay it and indemnify him, he is not obliged to wait until the mortgagee may choose to sue him, when perhaps the purchaser may become insolvent; but is entitled on the principle of *quia timet* to require an immediate settlement in order to protect him from the possibility of loss. And I should not think that the purchaser under such circumstances could object that thereby he would be compelled to keep the estate and pay the debt against his will; whereas he might otherwise be enabled to surrender the estate and avoid payment of the debt, he having purchased the estate and come under an obligation to indemnify the mortgagor so as to make him perfectly safe. These observations would go to prove that in order to confer a title to the relief which has been administered in this case, it is not necessary to show a privity between the party bound to indemnify and the creditor, but that it is sufficient to show the obligation to indemnify, and the possibility that through the delay of the creditor that obligation may become of no avail. It is obvious that the mortgagee may delay suit until the interest has accumulated, so as to render the estate a defective security, and then he may sue the mortgagor on the covenant, who, on attempting to obtain indemnity from the purchaser, may find that he is insolvent. This would be contrary to the intention of the legislature, which meant that the mortgagor should be perfectly safe after the equity of redemption had been purchased at sheriff's sale. Upon the whole I cannot see that the decree is wrong on this ground, and upon the other grounds I think it is right, and ought to be affirmed, and the appeal dismissed with costs.

Judgment.

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ON AN APPEAL FROM AN ORDER OF THE COURT OF CHANCERY.

RE FREEMAN, CRAGIE AND PROUDFOOT.

Practice—Appealable order—Costs.

The right of appeal from Chancery is confined to orders or decrees made in a cause pending between parties; where, therefore, an appeal was made to this court from an order directing the taxation of a solicitor's bill against his client in a particular mode, the court dismissed the appeal with costs.

The respondent, although he may, is not bound in such a case to move at an earlier stage to quash the proceedings.

This was an appeal from an order referring back the bill of Messrs. *Freeman, Cragie* and *Proudfoot* for taxation by the master, and directing the mode in which the taxation should be had. The circumstances are stated in the report of the case, Chancery Chambers Reports, page 102.

Mr. *Blake* for the respondents, (the solicitors,) on the matter being called on, objected, that this was not an order from which an appeal would lie, and referred to *McQueen*, 101-2.

Mr. *Roaf, contra*, submitted that this was not a proper mode of taking advantage of such an objection; the proper course was, by application to quash the appeal without suffering the appellant to incur the expense of preparing for the argument. If the court, therefore, should be of opinion that the appeal would not lie, no costs would be given on the dismissal.

But after the court took time to look into the practice the following judgment was delivered by

Sir J. B. ROBINSON, Bart., C. J.—This is an appeal from an order made by his Honour Vice-Chancellor *Esten*, on the 22nd of February, 1861, upon a petition of Messrs. *Freeman, Cragie* and *Proudfoot*, Solicitors, to the court, for a direction to the master to review his report and certificate made upon a reference to him for taxation of certain bills of costs delivered by the solicitors to *Daniel Totten*, their client. Judgment.

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Re Freeman, Oragie and Proudfoot.

The Vice-Chancellor, by the order complained of, did refer the taxation back to the master with certain directions, bearing principally upon the point whether the costs of taxation should, under the circumstances, be borne by *Totten* or by the solicitors. The costs of taxation had been allowed by the master at £16 4s. 3d.

It is objected on the part of the solicitors that this is not an appealable order. Th[illegible]unds on which *Totten* objects to it apply to the propriety of the directions given to the master respecting the costs of taxation, and the costs incidental to the reference.

We think the proceedings in appeal must be quashed under the 10th section of the Appeal Act, on the ground that this is not an appealable matter, there being no cause pending between the parties, in which the order complained of was made.

Judgment.

It is true that the ninth section of the act gives an appeal "from all judgments, orders, and decrees of the Court of Chancery," but that has been already taken to mean judgments, orders and decrees—whether interlocutory or final in a cause. The fifty-fourth section of the act shews that to be the intention; and the general principles which govern appeals in equity preclude an appeal from such an order as this. (*a*)

Then, besides that, this is an order made upon petition and not in any suit upon a bill filed: the subject matter of the petition and order is such that an appeal does not properly lie against the decision of the court upon it, which merely affects costs proper to be allowed by a taxing officer.

No case has been cited in support of this appeal, and both principle and policy are against it.

Per Cur.—Appeal dismissed with costs.

(*a*) McQueen on Appeals, ch. 1.

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY. 1862.

CARPENTER v. THE COMMERCIAL BANK OF CANADA.

Collateral Security—Defence at law—Plea of payment.

A defendant at law pleading a plea of payment, and either failing or neglecting to establish the plea, cannot afterwards set up the same facts as a defence to a bill in equity to enforce payment of the judgment at law.

An action at law having been brought upon a promissory note, and the defendant having pleaded that it had been given as collateral security for another debt, which had been paid, but adduced no evidence to establish this fact, was held precluded, in a suit afterwards instituted in the Court of Chancery to enforce the charge of the judgment against lands, from shewing any payment prior to the time of plea pleaded. [ESTEN, V. C., *dissentiente.*]

The bill in the court below was filed by the *Commercial Bank of Canada* against *Joel Carpenter* and *Brian Carpenter*, and set forth, that on the 31st of May, 1859, the plaintiffs recovered judgment in the Court of Queen's Bench against the defendants for £1559 15s. 10d. and costs, which was duly registered in the county of Wentworth, in which the defendants were possessed of certain lands (setting them forth); and that £100 14s. 1d. had been paid on account of such judgment; and prayed payment of the balance, or in default a sale. Statement.

The defendant *Brian Carpenter* answered, setting up that the judgment of plaintiff was recovered upon a promissory note made by the other defendant, and endorsed by one *McKinstry* and defendant *Brian Carpenter*, under the circumstances following: that *Joel Carpenter*, on the 21st March, 1857, was and for some time previously had been carrying on business as a merchant in Hamilton, and that the bank held notes endorsed by him, and which they had discounted for him to a large amount, which notes so discounted were notes of his customers; that a large portion thereof had been settled by notes endorsed by other persons; and that the note so endorsed by defendant was delivered to and accepted by the bank as collateral security for the balance of such customers' paper, being £3,000; it being alleged by the bank that one half of such balance was doubtful, but that the whole

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thereof had since been paid: that the loss, if any, had arisen in consequence of the bank neglecting to collect and get in money due upon the other notes delivered to the bank in settlement of the greater portion of such indebtedness.

The cause had been heard upon a motion for decree. The affidavit of the managing agent of the bank was read on behalf of the motion setting forth that the defendant *Brian Carpenter* was not personally aware of the circumstances under which the note was given to and accepted by him; that no such arrangement as alleged in the answer was made; that the only payment on account thereof was the sum stated in the bill; and that if any such defence had existed to the claim of the bank, the defendants had the opportunity of urging, and did by plea and at the trial of the action upon the note attempt to prove and urge, but without effect, all the supposed defences set up by the answer.

Judgment.

The defendants both made affidavits in opposition to the motion; and an affidavit of *McKinstry* was also read, in which he swore that he endorsed the note for £1,500 in consequence of the dissatisfaction expressed by the bank at the supposed lapse of a guarantee given for the amount of *Carpenter's* discount whilst *McKinstry* had been manager of the bank; and that there never was any intention that the said note for £1500 should be held for any other purpose than the protection of the balance of the customers' paper.

Upon the hearing, the court below directed that "it should be referred to the master of this court at Hamilton, to enquire and report whether the note on which the plaintiffs' judgment in the pleadings mentioned was recovered, was held by the plaintiffs as a collateral security merely, then, if so, for what; and if the said master shall find that such note was held by the plaintiffs as collateral security for the payment of any other promis-

sory notes, bills of exchange, or securities, or the payment of money, then said master is further to enquire and report whether any, and, if so, what, payments beyond the sum of one hundred pounds and fourteen shillings, credited in the plaintiffs' bill, have been made upon the notes upon which such judgment was recovered, or upon such judgment, or upon the promissory notes, bills of exchange, or other securities for the payment of money as collateral security for which such first-mentioned notes were deposited, since the pleading by the said defendant *Brian Carpenter* of his plea of payment in the action at common law in which such judgment was recovered; and in the event of the said master finding that enough has not been so paid, beyond the amount credited in the plaintiffs' bill as aforesaid, to satisfy the said judgment of the plaintiffs, the said master is to further enquire and report whether the defendants, or either of them, have any other, and, if so, what other, lands, tenements, or equitable or other valuable rights or interests in lands or tenements in the county of Wentworth, besides those particularly described in the plaintiffs' bill, and, if so, whether any person or persons other than the plaintiffs has or have any lien, charge, or incumbrance thereupon; and in case the said master shall find any such, then he is to cause them to be served with process under the general orders of this court in that behalf, and is to proceed to take an account of what is due to the plaintiffs and such other incumbrancer or incumbrancers for principal money and interest, and to tax to them their costs of this suit, and to settle their priorities. And this court doth reserve the consideration of further directions, and of the costs of this suit, and of all subsequent costs, until after the said master shall have made his report."

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Judgment.

From this decree the defendant *Brian Carpenter* appealed, assigning as reasons therefor, first, that in and by the said decree it should have been referred to

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the master of this honourable court at Hamilton, in case he found that the note on which the plaintiffs' judgment was recovered, as mentioned in the pleadings, was held by the plaintiffs as a collateral security for the payment of any other promissory notes, bills of exchange, or securities for the payment of money, to enquire and report whether any, and, if so, what payments beyond the sum of £100 14s., credited in the plaintiffs' bill of complaint, had been made upon the note upon which such judgment was recovered, or upon such judgment, or upon the promissory notes, bills of exchange, or other securities for the payment of money as collateral security, for which such first-mentioned note was deposited by the said defendant *Brian Carpenter* with the plaintiffs, since the same was so deposited and held by the said plaintiff's as such collateral security as aforesaid.

Judgment.

Secondly, that the defendant *Brian Carpenter* being surety for the other defendant *Joel Carpenter* to the said plaintiffs, is, but ought not to be, restricted by the said decree in this cause from shewing all payments made by him or any other person on the note first mentioned, or on account of the securities for which such first mentioned note was security, to the said plaintiffs since he became such surety as aforesaid, whether the same were made before or after the plea by the defendant *Brian Carpenter* in the action at common law.

Thirdly, that such last-mentioned plea, although assumed and declared by the said decree to be a plea of payment, is not such a plea in the form in which it was pleaded by the said defendant *Brian Carpenter*, nor does the said plea afford any evidence that the said defendant did or might show or attempt to show thereunder any payment or payments to the extent or effect of preventing him from showing in this cause all the payments made at any time by him or any other person since he became

such surety as aforesaid, in reduction of his liability as aforesaid. 1862.

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Mr. *Fitzgerald* for the appellant.

Mr. *R. Martin* for the respondents.

Sir J. B. Robinson, Bart., C. J.—It is somewhat difficult to deal with this case so as to attain the ends of justice without seeming to violate the principle—which it is important to maintain—of the conclusiveness of the judgment obtained at law in the action between the parties on this same note for £1500.

The truth of the case appears to be, that in the action upon the note there was clear proof of the allegation in the plea, that it was made and delivered by *Brian Carpenter* as security for his son *Joel Carpenter*, against any deficiency not exceeding that amount that might accrue in the collecting the notes that remained deposited with the plaintiffs after the withdrawal of seven thousand pounds' worth of the notes, for which those of *McKinistry* and others had been substituted. Judgment.

That part of the plea was not only not proved, but it was not even attempted to be proved. In order, however, to make the plea a defence against the whole or any part of the demand, it was necessary to go further, and prove what the plea further alleged, that payments had been made on the notes left with the plaintiffs, which the note of the defendants for £1500 was to secure, and to such amount as either left nothing due to the plaintiffs upon them, or not so much as entitled the plaintiffs to a verdict for the full amount of the defendants' note for £1500. But the fact is, that no attempt whatever was made upon the trial to prove any payment on account of the £3000, though clearly the plea admitted such evidence, and therefore the verdict at the trial went properly for the plaintiffs for the full amount.

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In framing the postea, however, this error has been committed—the jury are made to negative the first statement in the plea, namely, that the £1500 note was made and delivered as security for the payment of the notes amounting to £3000, which were still in the plaintiffs' hands, to be collected and applied in payment of the debt remaining due by *Joel Carpenter*. Now the plea could be no defence, unless that allegation is true; and if that had been in fact found against the defendant, it would have been wholly immaterial whether the customers' notes to the amount of £3000 had been paid or not; and so the verdict for the plaintiffs upon the plea would be correct, and it would be of no consequence that the jury had not specially found one way or the other as to the fact of payment. The trial of the action on the £1500 note took place before the learned Chief Justice of the Common Pleas; and upon examination of what passed at the trial, it is quite evident that the

Judgment.

postea had been incorrectly framed, as I have stated; for it was clearly proved upon the trial, and not contradicted by any testimony, that the £1500 note was made and delivered as security for the payment of the £3000 of notes left with the plaintiffs by *Joel Carpenter*; but as that fact alone would signify nothing, without proof of payment of the £3000, or of so much of it at least as would go to show that the plaintiffs were not entitled to recover for the whole amount of the note, the verdict, in the absence of any proof whatever of payment having been made on account of the £3000, was properly entered for the plaintiffs, though not on the ground on which the postea places it.

If there were payments, in fact, made on the other notes which would have shown this note in effect to be no longer recoverable either in whole or in part, the defendants was bound to show it on the trial of the common law action. The plea allowed and called for such evidence, if it could have been given; and we are bound to treat the verdict and judgment for the plaintiffs

as conclusive. The plaintiffs in their bill set forth the judgment; the defendant in his answer admits it; and the judgment was also proved in the court below. 1862. Carpenter v. Com. Bank.

I do not think, therefore, that it should have been referred to the master to enquire whether the note was given to secure the payment of the £3000 still due by *Joel Carpenter* on the notes deposited, because that question is disposed of between these parties by the judgment entered of record, which, while it is unreversed, is conclusive between them, no fraud in obtaining that judgment having been proved or alleged. The plaintiffs, however, have acquiesced in the decree, and the defendant *Brian Carpenter* only has appealed, and on the ground that payments made before the plea pleaded, as well as after that time, should be credited in the account to be taken by the master. No doubt if at any time before or after the plea there have been collections made by the plaintiffs on account of the £3000, which would not leave a deficiency as large as the amount of the £1500 note to be made up by *Brian Carpenter*, the plaintiffs should be willing in the accounts to give to the defendant the full benefit of such payments. I have no idea, from the evidence given in the case, that payments to that extent were made on account of the £3000 before the plea pleaded; and I think it scarcely a matter of doubt, therefore, that there is nothing substantial in the reasons of appeal. Judgment.

I think, without the assent of the plaintiffs, we ought not to admit of a reference to the master to enquire whether the £1500 note was given to secure the payment of so much of the £3000 due by *Joel Carpenter* or not; and if the judgment as it stands should be taken to be conclusive upon that point against the defendant, then there would be nothing to be enquired of but payments made since the trial *on account of the verdict;* for the judgment in the common law action, so long as it stands, establishes the fact that there is no connexion between the £1500 note and the £3000 due by *Joel Carpenter.*

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I think we cannot properly do otherwise than reverse that part of the decree which refers it to the master to enquire whether the defendant's note, *on which judgment has been recovered*, was held by the plaintiffs as collateral security, and direct that it be referred to the master to enquire whether any and what payments have been made since the trial of the common law action, on account of the verdict given in that action, or the sum for which judgment has been obtained; and I will suggest that on account of the manifest error in entering up the judgment, the plaintiffs' consent that payments made on account of the £3000 *since the trial* should be treated by the master as payments made on account of the claim under the judgment on the £1500 note, as if they had been made by *Brian Carpenter* himself.

Judgment.

In the accounts, as I stated before, the plaintiffs should be willing to admit an account to be taken of all payments *at any time* made on account of the £3000, in order that it may be ascertained whether in truth there remains any thing, and how much, due of the £3000, for £1500 of which the defendant made himself responsible; but we could not properly insist upon that, because the defendant should have given proof upon the trial of any payments that had been made.

ESTEN, V. C.—It appears to me that the judgment is inconsistent with the verdict of the jury. The latter negatives the fact of the note having been given upon any such understanding as that alleged in the plea; while the decree supposes that such fact may have occurred, and directs enquiries, in order to ascertain whether it had occurred or not. I presume, also, that if any payments had been made on a note before the entry of the judgment, credit would have been given for them, and the judgment entered for the true amount; so that it was unnecessary and improper to direct enquiry as to any payments between the plea and the judgment. But the question is, whether, if this note was really

given as collateral security for other notes, it was not competent for *Carpenter* to let judgment pass against him for the full amount, and to institute a suit in the Court of Chancery for an account, as that court has jurisdiction over all matters of security, and the account could more easily and effectually be there taken; or in case the plaintiffs did not proceed to execution at law on the judgment, but instituted a suit in the Court of Chancery, for enforcing their equitable charge, whether *Carpenter* could not have insisted that the note was given as collateral security, and prayed an account accordingly. I think such a course would have been proper on the part of *Carpenter*. If so, it must be immaterial that he pleaded a plea which he was not obliged to plead, and offered no evidence in support of it. Such appears to have been the fact, from his own affidavit, uncontradicted by that of Mr. *Park*. If, indeed, he had offered evidence, and the jury had rendered a verdict against him upon the evidence, the result might have been different. The question, then, having been properly raised at the hearing of the motion, evidence was received on both sides. It seems, at present, in favour of the defendant. The fact is distinctly stated by *McKinstry* and *Joel Carpenter*, and although it is denied by Mr. *Park*, he does not state upon what consideration the note was given. The court, however, wishing to afford an opportunity to adduce further evidence, directed enquiry on this head; but it seems to me that the enquiry was improperly limited to the time subsequent to the plea. If I am right in my supposition, that *Carpenter* might let judgment pass against him, and seek an account in the Court of Chancery, either by a bill of his own, or by way of defence to the plaintiff's bill, then the account should extend to the time of the delivery of the note, and I think the decree should be varied to this extent. If, indeed, *Carpenter* should be held bound to make his defence at law, and having pleaded such a plea, to sub-

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stantiate it by evidence, then I presume the result is conclusive against him, as we must suppose either that *McKinstry*, *Manson*, *Joel Carpenter* and *Park* were examined as witnesses, and the jury believed *Park* in preference to the others, and so rendered a verdict in favour of the plaintiffs, or that no witnesses were examined at all, in which case the defendant would be equally bound, having had an opportunity to make his defence, and not having availed himself of it. But in this case the decree would be erroneous, in directing an enquiry at variance with the verdict of the jury. However, as on taking the account it would have been absolutely necessary to show and recognise the purpose for which the note was given, the real transaction would inevitably have appeared. I think the decree should be varied to the extent I have mentioned, without costs.

Order.

That decree of the said Court of Chancery be reversed as to so much thereof as is in the words following, that is to say, "to enquire and report whether the note on which the plaintiffs' judgment in the pleadings mentioned was recovered, was held by the plaintiffs as a collateral security merely, or how otherwise, and if as a collateral merely, then for what? and if the said master shall find that such note was held by the plaintiffs as collateral security for the payment of any other promissory notes, bills of exchange, or securities for the payment of money, then said master is to further enquire and report whether any, and if so, what payments beyond the sum of one hundred pounds and fourteen shillings credited in the plaintiffs' bill, have been made upon the notes upon which such judgment was recovered, or upon such judgment, or upon the promissory notes, bills of exchange, or other securities for the payment of money as collateral security for which such first mentioned notes were deposited since the pleading by the said defendant *Brian Carpenter*, of his plea of payment in the action at common law on which such judgment was recovered." And that the said decree be varied by substituting for such reversed portion thereof, the words following, that is to say, "to enquire and report whether any, and if so, what payments beyond the sum of one hundred pounds fourteen shillings, credited in the plaintiffs' bill, have been made since the trial of the action at common law wherein plaintiffs recovered their said judgment in the pleadings mentioned, on account of the verdict obtained in such common law suit by the plaintiff at such trial, or on accoent of such judgment." And that except to the extent to which said decree is so reversed and varied, that the same decree be affirmed, and that the said appellant, *Brian Carpenter*, do pay to the said respondents, the said *Commercial Bank of Canada*, the sum of sixteen pounds, eight shillings and seven-pence, as and for the costs of the said appeal.

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[*Before The Hon. Sir J. B. Robinson, Bart., President; The Hon. Archibald McLean, Chief Justice of Upper Canada;* The Hon. William H. Draper, C. B., Chief Justice of the Court of Common Pleas; The Hon. Vice-Chancellor Esten; The Hon. Mr. Justice Burns;* The Hon. Vice-Chancellor Spragge; The Hon. Mr. Justice Hagarty; and The Hon. Mr. Justice Morrison.*]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

BERNARD v. WALKER.

Mortgage, created by an absolute deed—Joint tenant—Tenant in common.

The principal upon which parol evidence will be received to cut down a deed absolute on its face to a mere security considered and acted on.

Le Targe v. *DeTuyll*, 1 Grant, 277, commented on and approved of.

T. and B. being sureties for W. for the due payment of certain moneys to the City of Toronto, obtained from him a mortgage with a power of sale by way of indemnity; afterwards, having been obliged to pay certain money to the city, and being also liable to pay other sums on his account, they obtained from him an absolute deed for the nominal consideration of £1000; in fact no money was paid, nor did any accounting between the parties take place. Subsequently the holder of a prior mortgage instituted proceedings to foreclose, and on an application to extend the time for payment, T. made affidavit that the application was made as well on behalf of the mortgagor as on behalf of himself and B., and it was also shown that when the deed was signed T. stated that W. would retain his right to redeem, the object of the conveyance being merely to enable T. and B. to raise money to pay off the mortgagee, who was pressing, and other demands. On a bill filed by W. against B. and the representatives of T., (who had died in the meantime,) alleging the transaction to have been by way of security only, and praying to be allowed to redeem, a decree was made as prayed, which on appeal to this court was affirmed, notwithstanding the surviving grantee in the deed (B.) swore that the conveyance had been made by W. for the purpose of absolutely releasing his interest in the lands conveyed.—[DRAPER, C. J., dissenting.]

Whether the admission of one joint-tenant or tenant-in-common, as to the extent of the interest held by him and his co-tenants, is admissible as evidence against his co-tenants, *quære*.

The bill in the court below was filed by *Joseph Walker* against *Hiram Goodwin Bernard*, and *George P. Dickson* and *John C. Griffith* executors and devisees of

*McLean, C. J., and Burns, J., were absent when judgment was delivered.

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Charles Thompson, deceased, setting forth, among other things, that a certain deed made by the plaintiff to the defendants *Bernard* and *Thompson*, at the Island of St. Joseph, in November, 1851, (and bearing date 28th October, 1851,) though professing to be an absolute conveyance in fee by the plaintiff to them of lot 54 on the west side of Yonge street, in the township of Vaughan, (210 acres,) for the consideration of £1000, was in fact taken as a mere security for whatever balance might be due to them on taking an account between them and the plaintiff; that *Thompson* died in February, 1858, leaving *Griffith* and *Dickson* his executors; that *Thompson*, in his life-time, always admitted, and that his said executors now admit, that this deed was in fact a mortgage, and that plaintiff had a redeemable interest in the premises, but insist that the plaintiff is still largely indebted to the estate of *Thompson* upon the transactions between plaintiff and *Bernard* and *Thompson*.

Statement.

That *Bernard*, on the other hand, insisted that he had acquired an absolute interest in the said estate, under the deed referred to, and denied the plaintiff's right to redeem; and plaintiff prayed that accounts might be taken, and that he might be allowed to redeem, &c.

The defendant *Bernard* in his answer stated, what the plaintiff had also set forth in his bill, that the plaintiff had previously given to him and *Thompson* a mortgage on these same lands, to secure them against any loss or liability which they might incur as sureties for the plaintiff to the city of Toronto, for the due performance of certain obligations incurred by the plaintiff, as collector of market fees in the said city. [This mortgage contained a power of sale to be exercised by *Bernard* and *Thompson* for the purpose of indemnifying them in the event of *Walker* failing to save them harmless.]

That they, *Bernard* and *Thompson*, had been com-

pelled to pay large sums to the city on account of *Walker*, and being still liable for larger sums, they went to the plaintiff at St. Joseph's Island, and agreed with him in November, 1851, that the plaintiff should convey to *Bernard* and *Thompson*, absolutely in fee simple, his equity of redemption in the said land, in satisfaction of what they had already paid for the plaintiff as his sureties to the city, and in consideration of their undertaking to pay, as they then did for the plaintiff, all further sums which he might be liable to pay to the city of Toronto in respect of market fees.

That they did afterwards fully pay to the city all further sums for which the plaintiff was so liable, such payments for the plaintiff amounting in the whole to £900 and upwards.

He denied that the deed of October, 1851, was intended to be by way of security merely, and insisted that it was designed as an absolute purchase, as the deed on its face purported to be, stating, "I deny it to be true that either the said *Thompson* or myself, on the occasion of our being at St. Joseph's Island as aforesaid, or before or at or about the time of the execution of the said deed, ever stated to the plaintiff that the said deed should be considered or taken as a mere security for the balance that might be due us on taking the account between us; and I deny further that it was ever stated, agreed, or understood by me, either to or with the said plaintiff, or any person on his behalf, that the said indenture should be a security for any purpose, or that the same should be considered otherwise than an absolute purchase deed: and I say, that to the best of my knowledge, information and belief the said *Thompson* in like manner took the said deed as an absolute deed; and did not, before or at the time of the execution of the said deed, state to the said plaintiff, or in any manner agree with the plaintiff, that the said deed should be considered as a security merely, but I believe the said Thompson, like myself, regarded and treated the transaction as an absolute purchase of the plaintiff's estate in the said lands, for the consideration before mentioned."

Statement.

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Bernard further stated, in his answer, that he afterwards went into possession of the lands, upon an agreement between him and *Thompson*, and had expended large sums of money in improvements. [This statement as to improvements was not borne out by the evidence.]

That *Walker* having given a mortgage on the land to secure the purchase money to the person from whom he had bought the estate, and the holder of that mortgage having pressed for payment and obtained a decree of foreclosure, the said defendant did, on the 28th December, 1853, pay to her solicitor £1200 12s. 4d., for principal, interest and costs, "and that thereupon the said solicitor delivered over to him the mortgage deed, and signed an undertaking to transfer the same as he should require;" and that he did not belive it to be true that *Thompson* ever admitted that the deed so made at St. Joseph's was intended by way of security merely; and if he ever did make such admission, it was without his, the said defendant's, privity, consent or acquiesence.

Statement.

The defendants *Griffith* and *Dickson*, executors of *Thompson*, denied all knowledge of what conversation took place with the plaintiff at St. Joseph's, at the time of executing the deed to *Bernard* and *Thompson*, or that they had ever stated that the deed, though absolute in its terms, was intended to be a security merely, or that they had ever heard *Thompson* say so; but they admitted that *Thompson* had told them that if, when he and *Bernard* should sell the estate, his proportion of the price obtained for it should exceed the amount of the claim which they had against the plaintiff by as much as would satisfy the debt which the plaintiff owed to *Thompson* individually, he, *Thompson*, would be willing to give the excess to the plaintiff as a free and voluntary gift; that knowing such to have been *Thompson's* intention, they had admitted it to be the fact, and intended, if it could have been legally done by them as executors, to have carried *Thompson's* intention into effect.

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The deed in question was an ordinary deed of bargain and sale, by which the property was conveyed to *Bernard* and *Thompson* in fee, for a consideration, as the deed stated, of £1,000, acknowledged in the deed to have been paid.

The plaintiff, having mortgaged the land in 1845, to the person from whom he bought it, to secure £900, an unpaid portion of the purchase money, Mrs. *Washburn*, the holder of that mortgage, proceeded to foreclose it in a suit instituted before the deed was executed at St. Joseph's Island, and while that suit was pending, and after the execution of the deed, *Walker*, *Bernard*, and *Thompson* joined in instructing a solicitor, for their common benefit, to endeavour to reduce the claim under the mortgage; and both *Bernard* and *Thompson* instructed him also to make an application to extend the time for paying the mortgage debt to Mrs. *Washburn*, which application was successful. In support of it, two affidavits were made by *Thompson* on the 10th and 19th December, 1853, respectively. In the first of these he swore "that the mortgaged premises in this cause are, to the best of my knowledge and belief, worth more than double the sum found due and payable to the plaintiff, under the master's report in this cause; and I do further say that the said defendant is now resident on the Island of St. Joseph, in Lake Huron, and that I am making exertions on his behalf to raise the money payable to the plaintiff for principal money, interest, and costs, under the said report; and I further say, that I verily believe that if the time be extended by this honourable court, for the redemption of the said premises, for a period of six months, the said defendant will be enabled to redeem the same."

Statement.

In the other affidavit, he swore "that I, this deponent, and one *Hiram Goodwin Bernard*, of, &c., being responsible as sureties for the above named defendant in a large sum, and having paid considerable sums of money on account of such suretyship, the said defendant (*Walker*) some time, and about two years since, conveyed to me, this deponent and the said *Hiram Goodwin*

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Bernard, his equity of redemption of and in the mortgaged premises, mentioned in the pleadings in this cause, upon trust, or under the agreement and understanding that they should sell the same, and discharge the mortgage security held by the said plaintiff, and the moneys due, and to become due and owing to this deponent and the said *Hiram Goodwin Bernard*, under or in relation to the said suretyship, together with all costs, charges, and expenses incurred by them in relation thereto, and then to pay the surplus of such purchase moneys to the said defendant; and I do further say, that during the course of the past summer I have been in continual communication with the said defendant, on the Island of St. Joseph, in Lake Huron, and have had many conversations with him in relation to the said mortgaged premises, and have been fully empowered by him to act in the said matter, and to proceed in the matter of the redemption of the said premises for his interest, and as agent for him, as well as on the behalf of myself and the said *Hiram Goodwin Bernard*."

Statement.

The solicitor who prepared these affidavits, swore that he was instructed by, and was acting in the interest of, *Bernard* and *Thompson*, as well as of the mortgagor, *Walker*, in using them for the purposes mentioned; that there was an appeal from the master's report, and that he received instructions for the appeal from *Bernard* and *Thompson;* that he examined the witnesses in the master's office, and that there was no contention between *Thompson*, *Bernard*, and *Walker;* that *Thompson* first mentioned the matter to him, and was the one who principally came to him. He charged his costs against *Thompson*, because told by him that he would see them paid, and would pay them when the estate was sold; that he supposed *Bernard* knew nothing about the payments by *Walker*, (on account of Mrs. *Washburn's* mortgage,) and did not therefore apply to him to make affidavits. He further swore, "I cannot say of my own knowledge that *Bernard* was privy to the contents of the two affidavits. I never read them to him."

Mr. *Crew*, son of an auctioneer now deceased, was

also examined for the plaintiff in this cause, and swore that he recollected this farm being offered for sale in March, 1857. It was advertised in *Thompson's* name alone. *Bernard* objected to his own name being omitted, and, with *Thompson's* assent, the sale was deferred a few days, and new handbills printed with a fresh heading, *Bernard's* name being inserted with *Thompson's*, as joint proprietors. He says that he heard *Thompson* (speaking only of himself, and not mentioning *Bernard*) state, over and over again, that all he wanted when the property was sold was his money, and six per cent. interest, and that the balance should go to *Walker*.

The printed advertisements of the sale were headed, "To close the settlement of an estate"—"Farm for sale." The names "*Charles Thompson* & *H. G. Bernard*, Proprietors," being printed at the foot. The handbill being signed by *W. B. Crew*, as auctioneer.

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In the printed conditions of sale, the terms of payment are stated to be ten per cent. down; a further sum, to make up £2,000, in one month from the date; at which time the purchaser "shall receive an assignment of his purchased rights, free from incumbrance," and the balance of the purchase money to be paid in four equal annual instalments, with interest, at the rate of six per cent. per annum, to be secured by mortgage on the property.

Marsh, a farmer, who had lived thirty-seven years near the property, swore, that in 1851 the lot in question was then worth rather more than £2,000, at one or two year's credit; or £2,500 at six years' credit by annual instalments, with interest; or £3,000 at 12 years' credit, payable in the same manner.

When it was put up for sale in 1857, it was offered at an upset price of £20 per acre, and *Marsh* swore "that the land was in his opinion worth that at the time, at a six years' credit, and that it is now worth that; that

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there were 200 acres of wood land, worth $40 an acre; and that a farm in the neighbourhood, not more valuable than this, was sold in 1856 or 1857, for £25 an acre; that he (*Marsh*) thought of buying the farm now in question in 1857, as *Thompson* was indebted to him; but the debt not being sufficient to cover the price, he did not purchase, though *Thompson*, he swore, told him he need be under no apprehension about the balance," (that is, about being pushed inconveniently for the balance,) "for that, after settling certain claims that they had against *Walker*, the balance was going to *Walker*, and he wished it to remain invested, so that he (*Marsh*) would have time enough to pay." He also swore that he had several conversations with *Thompson*, and "that it was always understood the balance was going to *Walker*, after paying their claims," which *Thompson* said was on account of moneys paid by them (that is, by him and *Bernard*) to the corporation of Toronto, for *Walker*. "I never had any negotiations," he added, with "Mr. *Bernard* about the farm. I understood *Thompson* to be speaking both for himself and *Bernard*, but I cannot say what he meant; however, he always spoke in the plural number."

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Other witnesses placed the valuation of the property much lower than this witness; and at the auction no one was found willing to give the upset price of £20 an acre, in consequence of which no sale took place.

Another witness (*Watson*) also called for the plaintiff, swore that he was intimate with *Thompson*, and a connexion of his, "he frequently told me, in conversation, to the effect that a deed of sale had been made of the property in question, as a means to relieve it of existing liabilities, and to protect Mr. *Walker* and his family, and that the balance would accrue to Mr. *Walker* for the benefit of his family, and that he expected there would be a handsome surplus." "*Thompson*," he adds, "told me what I have stated about the surplus on different occasions during 1854, 1855, and 1856, when I was doing business along the coast of the lake, as far as Sault Ste. Marie. *Walker* and *Thompson* were intimate friends; *Walker*, I think, reposed great confidence in *Thompson*."

The defendant *Griffith* was called by the plaintiff as

a witness. He swore that he had heard *Thompson* say he was sorry he had put the upset price so high. "I knew nothing," he said, "of *Walker* having any claim to the property until after *Thompson's* death. *Thompson* frequently told me that when the property should be sold, and he and Mr. *Bernard* should be paid, he intended to give *Walker* the balance." 1862. Bernard v. Walker.

It was proved that on the 28th of December, 1853, a day or two before the time appointed in the foreclosure suit of Mrs. *Washburn* against *Walker* for paying up the amount due, *Bernard* paid to Mrs. *Washburn's* solicitor, from his own money as it appeared, £1,200 12s. 6d., being the amount then due with interest.

He desired to have that mortgage assigned *to him*, which was declined for want of a proper order from *Walker* directing such assignment. The objection made was, that no authority was given by *Walker* for assigning to *Bernard* alone without *Thompson*. Mr. *Bacon*, the solicitor who attended with *Bernard* to see the money paid by him, swore that *Thomson* told him that when the property should be sold, after he was paid principal and interest, he intended the balance should go to *Walker*. So far as he was concerned, he said, he had always intended so. He said, at the same time, that he did not consider Mr. *Walker* was entitled to redeem. Statement.

The deed of the 28th of October, 1851, was executed at St. Joseph's, in the presence of one *John C. Spragg*, who alone signed it as a subscribing witness, and he gave this account of what passed within his observation:

"The deed was executed in my presence by *Walker* and wife, *Bernard* and *Thompson*. I made the interlineations which made *Charles Thompson* a party to the deed throughout; they are in my handwriting; they were made at Mr. *Walker's* house at St. Joseph's. I met *Thompson* and *Bernard* on board of the steamboat. As soon as we arrived, Mr. *Thompson* asked me to go with him and *Bernard* to *Walker's* house, to witness a

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document; I did not know what. I went with them to *Walker's* house. We met *Walker* at the wharf; he did not accompany us to the house, *Walker* staid on the wharf. When we reached the house we passed through two rooms into an inner or third room. *Walker* joined us in about fifteen or twenty minutes. When he came, *Thompson* produced a document, and laid it on the table, and said, 'Mr. *Walker*, I want Mrs. *Walker* and yourself to sign this document.' *Walker* went and fetched Mrs. *Walker* into the room. Mrs. *Walker* objected to sign the document; she said she had already signed, and she did not think it necessary she should sign any more. *Walker* then examined the document, and found it was made to *Bernard* alone, and he objected; and then, and for that reason, the interlineations were made, to remove that objection. *Walker* required *Thompson* to be a party. *Thompson* replied to Mrs. *Walker's* objection, that the deed would not affect *Walker's* right of redemption; that he still would have a right to redeem, otherwise the property would have been sold to meet liabilities that had been incurred, that it would have been sacrificed; and he urged this mode of settlement as preferable. I understood it was to raise money to pay off what was due on the place, and other liabilities that were pressing. After this conversation the deed was executed. *Bernard* was present during part of the conversation. When *Walker* and his wife entered the room, *Bernard* stepped into the adjoining room. The door was open between the two rooms, and remained open during the conversation. It was an ordinary board partition between the two rooms; a single row of boards set edge to edge; it was not tongued and grooved; it was not tight. The room we were in was a small one. I have no doubt whatever that a person in the adjoining room would hear all that passed in the room where we were. No accounts were gone into; no statement of figures made; no money passed; nothing more was said that I know of, and upon the statement I have mentioned the deed was executed. I went up in the steamer with *Thompson* and *Bernard*. I did not know what they were going for until a few minutes before we arrived; they did not shew me the deed till we got into the house; I had no conversation with *Thompson* and *Bernard* about the deed. I did not read the deed; *Walker* read the deed himself. All he said was that he wanted *Thompson's* name inserted as

Statement.

well as *Bernard's*. *Thompson*, when he produced the deed, said it was for the purpose of raising money to meet liabilities. It was not said that *Thompson* and *Bernard* were to sell the property, but to raise money on the property. I am not sure that *Bernard* was in the room when this was said; I concluded that he was in the adjoining room, but do not know; I saw him leave the room where we were, and go into the adjoining room, but do not know whether he remained there. I did not call the attention of *Walker* and his wife to the fact that this was an absolute deed; I made no remarks myself about it. * * * I think the time occupied was about twenty minutes or half-an-hour. *Thompson* took the deed when it was executed. I left almost immediately after the business was finished, and went to Sault St. Marie. I do not know whether *Bernard* was absent at the time of the conversation; I think I missed him just before he was required to execute the document; I think he was not present when the discussion took place. * * * *Bernard* signed the deed in my presence; he signed the deed in my presence; he signed it at St. Joseph's, at *Walker's* house: they all signed it at the same time. I cannot say whether *Bernard* entered the room after he first left it until he was wanted to sign the deed."

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Statement.

The defendant, *Bernard*, was examined in the cause, on behalf of the plaintiff. His statements, bearing upon the taking of the deed, and the object and intention of it, were as follows:

"I remember going to St. Joseph's Island; I was there, at *Walker's*, about an hour; I stayed while the boat stopped to wood and land passengers. I believe Mr. *Thompson* was with me; he took the deed with him. I don't know who wrote it. I can't recollect when the interlineations were inserted. No accounts were produced, that I recollect. Mr. *Spragg* went up with us. I heard no talk about accounts. The amount was spoken of that we had paid, and what we had to pay, to the corporation. I don't recollect any figures being mentioned. No money was paid. I did not think there was much due on the *Washburn* mortgage; I thought not more than half was due that was found due afterwards; I thought only about £350 was due at the time; it was so said. I don't remember giving evidence in the

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master's office, but I might have done so. I don't recollect any negotiations to reduce the amount. I don't recollect stating in the master's office my reasons for interesting myself. I don't recollect saying that I and *Thompson* were the absolute owners of the land; nor can I account for not doing so, except that I did not know much about the matter. I don't recollect about my evidence; it is ten years ago; my memory is not very good; I have frequently forgotten matters. I was in possession of the property when I went to St. Joseph's Island. I think I recollect telling *Walker* that Mrs. *Washburn* was pressing. When first asked I thought not, but on reflection I think I did; but nothing has occurred to alter my view. I went up to get the deed. I cannot say why I told him that the mortgagee was pressing. The suit had been commenced; I had ascertained that it was true. I did not know when the debt would have to be paid. * * * *Thompson*, I think, was not looking after the land more than myself. He was, however, backwards and forwards to St. Joseph's Island. He wished me to go to St. Joseph's. I had no communication with *Walker* about giving the deed before I went. I think *Walker* knew we were coming. I don't know who told him; likely it was *Thompson*. I don't know by whom it was arranged that we should go up; I did not arrange it. I believe that *Thompson* had been speaking to *Walker* with reference to our going up. *Thompson* proposed to me to take the deed in my own name some time before we went up. I objected to it at the time, because I wanted my money back, and wanted *Thompson* to pay his share of what had been paid by me, and was to be paid; and then *Thompson* agreed to go shares, and take a joint deed. I have been in possession of the land ever since. I have received very little money from it. The property has always been for sale, and it has been let from crop to crop; for the last two or three years it has been leased. I don't recollect what had been paid when we went up to St. Joseph's Island. I think I have paid the corporation about £900. I have got receipts for all I paid, I think. The property was then supposed to be worth £1,500; but it was offered for sale afterwards, and £1,350 only offered. * * * The property was offered for sale twice by me and *Thompson*; the last time in March, 1857. We instructed *Crew* to offer it for sale. *Thompson* fixed an upset price, and it was offered for that; I think seventy or

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eighty dollars the acre. *Thompson* prepared an advertisement." 1862.

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On his cross-examination he said, "I went to St. Joseph's with *Thompson* to get an absolute deed of the property, and *Thompson* and I were thenceforth to be the owners of it. *Walker* understood the transaction to be so. * * * *Thompson* was a party to offering the property for sale both times."

Re-examined.—* * * "I did not read the answer over before I swore to it. Nothing particular was said when the deed was executed; the deed was merely signed; nothing was said about the bargain; it was all arranged before we went up, and nothing was said at the time."

In the foreclosure suit of *Washburn* v. *Walker*, *Bernard* was examined on the part of *Walker*, and made a deposition, in which, among other things, he stated that he "went several times with *Walker* to Mr. *Morrison's* office (the solicitor for Mrs. *Washburn*) about Mrs. *Washburn's* mortgage. * * * The reason that I took an interest in effecting a settlement between *Morrison* and *Walker* respecting the mortgage was, that I and Mr. *Thompson* were security to the corporation of the city for *Walker*. There is a mortgage registered upon the lands in question, in favour of myself and *Thompson*, as a security for our liability to the corporation. The mortgage is conditioned to hold us harmless." Statement.

It was proved that soon after the execution of the deed of the 28th of October, 1851, *Bernard* went into possession of the farm, and retained possession afterwards by himself or his tenants; and he himself stated that this was upon an understanding with *Thompson* that he was to pay a rent to him proportionate to *Thompson's* interest in the premises, which was to be governed by the proportion that *Thompson* should be found to have paid of the liabilities which they two had assumed to the city of Toronto on *Walker's* account.

The cause came on to be heard upon the pleadings

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and evidence in May, 1861, before his Honour Vice-Chancellor *Esten*, when a decree was pronounced in favour of the plaintiff, declaring him entitled to redeem, and directing the usual accounts to be taken. From this decree *Bernard* appealed, assigning as reasons therefor, first, that the conveyance in the pleadings mentioned of the 28th day of October, 1861, was absolute in fact as well as in form, and was not intended to be conditional or by way of security; second, that the evidence produced to the Court of Chancery by the respondent *James Walker* to prove that the assignment was conditional or by way of security was inadmissible, as contravening the Statute of Frauds, and ought also on other grounds to have been rejected.

Statement.

In support of the decree, the respondent *Walker* assigned the following reasons: first that it sufficiently appeared by admissible evidence that the conveyance in question was not agreed, or intended to be, and was not in fact, though it may have been in form, absolute, but was agreed, and intended to be, and was in fact though not in form, conditional or by way of security, as the same is by the said decree declared to be; second, that the said decree must at any rate be sustained as far as respects the interests of the other defendants in Chancery, and the equities between the parties cannot be adjusted, or the said decree varied or reversed, in the absence of the said other defendants in Chancery who are necessary parties to this appeal.

Mr. *Strong*, Q. C., and Mr. *Crombie* for the appellant.

Mr. *Blake* and Mr. *J. McNab* for the respondent (*Walker.*)

The authorities principally relied on by counsel appear in the judgment.

Robinson, Sir J. B., Bart.—As to the deed of the 28th October, 1851, which the plaintiff affirms was given

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by him, and was accepted by the grantees, *Bernard* and *Thompson*, upon the intention and with the understanding that it was not to operate as an absolute conveyance, but only as security for whatever amount he should be found to owe to them in consequence of their having become security for him to the City of Toronto, two things are quite plain—first, that the deed is on the face of it an absolute conveyance as from a vendor to a purchaser, and contains not the slightest intimation that it was given as a security for any pre-existing debt, or that the land was conveyed upon trust or special understanding or agreement of any kind; and secondly, it seems equally clear that if we admit that a sale was intended, this was not a case in which the evidence affords ground for supposing that it was agreed, as it sometimes is between a vendor and a vendee, that the vendor should be allowed the privilege of re-purchasing upon returning the price that he had been paid with interest, or on any special condition of that kind.

Judgment.

The consideration expressed was £1000; but it is plain on the evidence that that was a sum named without any refence to the value of the land, either in fact or as agreed upon by the parties. The defendant *Bernard*, in his own account of what passed at St. Joseph's, makes that clear: "No sum," he says, "was spoken of as the price that was to be paid for the land; no accounts were gone into, and no sum was mentioned." He had advanced, he said, large sums, and expected to have to pay more, on the plaintiff's account; and without any thing more definite than that as to the amount that the plaintiff did owe or was likely to owe to him and *Thompson*, in consequence of their having become sureties for him, it was agreed at St. Joseph's that he should make this absolute deed to them, in satisfaction of the indemnity they were or might be entitled to claim.

It would be difficult to credit this statement, even if

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there were nothing expressd in the evidence to contradict it. Among men of business, it could scarcely happen that such a transastion would be conducted so loosely; for the plaintiff could not have known at the time what he was getting for his land, a valuable improved farm in a highly favourable situation; and for all that appears either in the deed or otherwise in the case, he got nothing, and asked for nothing, in the shape of a discharge from his liability to indemnify, which the defendant says was the real object of the transaction. No doubt the plaintiff might have agreed to give up his equity of redemption, in satisfaction of the debt, to his sureties, and that would have been as much a sale as if it had been made upon a new consideration, paid to him in money; but we can hardly believe that such a transaction would have taken place without any attempt to ascertain the true amount of the debt, and without something being given that would show the plaintiff discharged.

Judgment.

The defendant *Bernard* states now that he has paid in all about £900 to the city. It does not appear that *Thompson* made any payments. But *Thompson* had had various dealings with the plaintiff unconnected with this matter of the suretyship; and it appears to have been agreed between the plaintiff and the other two, that if *Thompson* should be found indebted in any sum to the plaintiff upon these private dealings, that should be allowed to stand against the advances made by the two on his account; and *Thompson* and *Bernard* were to adjust the account between themselves on that understanding.

Whether a large portion of the sums advanced for the plaintiff might not have been covered by an amount of debt due to him by *Thompson*, is uncertain on the evidence. There are conflicting statements on that point, and no account has yet been taken.

The plaintiff had bought the farm in 1845, for £1,150,

paying £250 down, and giving a mortgage on the land for the residue. Whether he got it for less than its value at the time does not appear. If the place was not worth more, it is proved that it had become of much more value in 1851; but as £900 of the purchase money had not been paid by the plaintiff, and formed an incumbrance on the property, we must suppose that the plaintiff, before he made over his land in satisfaction, would have taken care to see that he got such a sum above the incumbrance, and the interest upon it, as would make up about the value of the land in 1851. According to the evidence given by Mr. Marsh and others, that would hardly have been accomplished by his giving up the land by way of indemnity to his sureties, even if he had really no debt due by Thompson that would have covered any considerable part of what had been paid out for the plaintiff. 1862. Bernard v. Walker.

It is not pretended that the plaintiff got any other consideration for his interest in the land, if he really did part with it absolutely. His letting it go upon too easy terms, however, would give him no claim to have the transaction looked upon as a security rather than a sale, if for all that appeared it was a sale that was intended; but when we have conflicting accounts of the real intention of the parties, apparent inadequacy of consideration does form a fair ground of argument. Judgment.

Looking only at so much of the evidence as I have yet remarked upon, the effect of it, I think, would be such as to produce a strong moral conviction that the parties could not have agreed and intended that the land was to be given up to the grantees as a full indemnity for all that they had paid or would have to pay for the plaintiff as his sureties, and that without any further accounting, or any thing more to be done, the land was to be considered as theirs, and the matter of the suretyship thus finally closed.

But, granting that that would seem improbable, we

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are yet to consider, on the other hand, that no fraud or mistake in obtaining or giving that deed is proved or alleged, and that the deed must therefore have effect according to its language, unless we find ourselves warranted, by evidence admissible in such cases in courts of equity, in directing that the transaction should be regarded in a different light.

It has been urged by the counsel for the defendant *Bernard*, that there is no such evidence as can be relied upon, or can even be received in equity, for cutting down the absolute estate which the deed by its language has given to the grantees.

This brings up several questions, which have been already so much discussed in this court, in several cases we have had before us, that we may assume them to be settled by decisions which are binding upon us, leaving only that occasion for doubt, that it is difficult in most cases to exclude, as to the correct application of the principles to the facts of the particular case.

Judgment.

The cases in this court which I refer to are, *Greenshields* v. *Barnhart*, (*a*) *Howland* v. *Stewart*, (*b*) *Matthews* v. *Holmes*, (*c*) *Arkell* v. *Wilson*, (*d*) *Wragg* v. *Beckett*, (*e*) *Monro* v. *Watson*. (*f*)

Two of these cases—*Greenshields* v. *Barnhart*, and *Matthews* v. *Holmes*—having been carried to England by appeal, the judgments given by the judicial committee of the Privy Council are reported in 5 Grant, 99, and 5 Grant, 1. And besides these cases, the Court of Chancery had occasion, in the case of *LeTarge* v. *DeTuyll*, 1 Grant, 227, to consider the nature of the evidence on which courts of equity can act, in holding a conveyance to be a mortgage which upon the face of it purported to be an absolute conveyance. We have expressed our

(*a*) 3 Grant, 1.
(*b*) 2 Grant, 61.
(*c*) 5 Grant, 1.
(*d*) 7 Grant, 270.
(*e*) 7 Grant, 220.
(*f*) 8 Grant, 60.

concurrence in the conclusion come to in that case, though in some later cases, in which it was cited, we thought the principle on which it was determined was desired to be pushed to a length which the decision in the case itself did not warrant.

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Upon a review of the cases I have mentioned, and the many English decisions which are cited in them, we must hold, I think, that the plaintiff in this case should not be allowed to redeem, if he had nothing to rely upon but the verbal evidence of witnesses that the defendant *Bernard* had, either at the time of the deed of the 28th of October, 1851, being executed, or afterwards, admitted that that deed was only taken as a security, and was not intended to operate as an absolute conveyance. Still less could any evidence avail of conversations had with him before the deed was made. That there may be facts shewn, either by written or verbal evidence, which, when established to the satisfaction of the court, may lead to the conviction that a deed on the face of it absolute could not have been intended so to operate between the parties, and that this will lay a proper foundation for receiving parol testimony to explain what was the real nature of the transaction, is clear on numerous authorities, and is explained in the cases of *Le Targe* v. *De Tuyll* and *Mathews* v. *Holmes*, and in the well considered judgment given by Mr. Justice *Burns* in *Howland* v. *Stewart*. Whether, without such evidence, the proof of mere verbal declarations of the defendant *Bernard* in the case before us could have been admitted to contradict the deed, need not be for a moment considered; for there is no proof whatever of any declarations or admissions of that kind by *Bernard*; none in his answer, and none independently of it. On the contrary, the defendant distinctly denies what the plaintiff affirms in that respect.

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But the plaintiff relies on the following circumstances, of which there is evidence: first, that according to

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the defendant's deposition in this case, and from the other evidence, no certain sum was paid or agreed to be paid as the price of the land, nor any thing said or considered between the parties in regard to its value, nor any reckoning of the amount which the grantees in the deed had already paid to the city on the plaintiff's account, or of the amount which they would be called upon to pay thereafter, nor any amount brought forward, or spoken of as being due by *Thompson* to the plaintiff on their mutual transactions; though it had been understood that any debt due by *Thompson* should be allowed to be set against the moneys advanced or to be advanced by the grantees in the deed to the city, on account of the plaintiff.

If the transaction was really such as *Bernard* represents—simply a sale of the land in consideration of whatever claim *Thompson* and *Bernard* might have upon the plaintiff for indemnity—it would certainly seem strange that the parties should have entered into no calculations to ascertain how far the land would or would not be a just satisfaction of the indemnity which the sureties would have had a right to claim. If the plaintiff had certainly no other property than this land, and if there was no likelihood of his ever owning any thing else afterwards, and if it was quite clear that the plaintiff's equity of redemption in this lot, in addition to the amount of any debt that *Thompson* then owed him, could not be worth so much at that time, then it might well be that they would agree to take the land in full satisfaction, and that the plaintiff might be willing to let it go absolutely and without any stipulation for redemption. But even then it would be strange, among men of business, that nothing should be done or said, either then or, for all that appears, at any other time, with a view to ascertain how the parties stood—how much the sureties had paid, and how much they would probably have still to pay; that there should be no sum spoken of as the reasonable value of the land that the

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plaintiff was making over finally, as the deed imports: no attempt made to ascertain how the plaintiff and *Thompson* then stood, upon their mutual dealings, which would be necessary to be known before the relative interests of *Thompson* and *Bernard* in the land could be adjusted as between themselves, as it was to be, according to *Bernard's* own account of the matter; and strange, too, that there should be nothing in writing given on the one side, or asked on the other, for securing the plaintiff against any after claim upon him that *Thompson* and *Bernard* might make. It stands admitted that the £1000 mentioned in the deed was an imaginary sum, put in without any regard to the price or value of the land; and the deed contains not a word of explanation that would show any connexion between it and the suretyship which *Thompson* and *Bernard* had undertaken.

Judgment.

If it was necessary to form an opinion upon the question of fact, whether the plaintiff's interest in the land was or was not at that time worth much more or any thing more than the claim which the plaintiff's sureties would have had upon him after they should have paid all they were liable for, we should be unable to satisfy ourselves upon the point. We know that the plaintiff's mortgage of the land for £900 of the purchase money was yet unpaid, and perhaps some interest on that debt. Whether that incumbrance, added to all the claim which *Thompson* and *Bernard* had or might afterwards have upon the plaintiff as his sureties, would equal or exceed what the land was worth in 1851, we cannot tell, without knowing whether *Thompson* owed him a debt, and of what amount, and without some precise evidence of the value of the land, and the amount which the sureties have paid in all.

I have no doubt that neither the want of a due proportion between the benefit which the plaintiff received from making the conveyance, nor the want of such steps

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as are ordinarily taken among men of business in conducting similar transactions, could be relied on as sufficient for shewing that the deed absolute in its terms must have been intended only as security, and should be so treated; but that part of the case is nevertheless material as being in accordance with, and tending to confirm what may be inferred from, other facts which have the same tendency.

Then another fact proved in the case is, that when, on the 4th November, 1857, *Thompson* and *Bernard* offered the land for sale by public auction, through Mr. *Crew*, their auctioneer, they did, by a printed handbill, signed by *Crew*, their agent, and to which their names are added in print as proprietors, advertise the sale as about to be made, "to close the settlement of an estate." Now, all three were then living; there was no estate of a deceased party that could have been meant. But if,

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as the plaintiff asserts, the deed was only given as a security, and if it was intended that *Thompson* and *Bernard* should indemnify themselves by selling the estate, and should pay over to the plaintiff any surplus above their claim, then there would be a settlement to be made, which might naturally enough account for the sale being spoken of as a sale to be made "to close the settlement of an estate;" for until the estate was sold, the ultimate rights of the parties respectively to its value or proceeds could not be settled. This does seem, therefore, to point to a sale about to be made for some other purpose than simply to turn the land into money, at the will and for the benefit of the vendees as owners. It is proved that *Thompson* drew up this notice, and that both he and *Bernard* concurred in the terms of the sale, and were both present at the auction. I refer to this not as a circumstance by any means important, if it stood alone, but material as strengthening the other evidence in the cause—I mean the circumstance that he was recognizing the attempt to sell, and acting, or endeavouring to act, through his agent, in

selling the estate, under an advertisement such as I have described.

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There is next the further fact, that when the foreclosure suit was brought by Mrs. *Washburn* against the plaintiff, after *Thompson* and *Bernard* had taken their conveyance of 28th October, 1851, and while that suit was pending, both *Thompson* and *Bernard* are shewn to have taken an active part in assisting the plaintiff *Walker*, as owner of the equity of redemption, not only to reduce the amount claimed to be due on the mortgage, but also to have the time extended for payment, and to have joined in instructing counsel for these purposes; though if the deed he had taken from the plaintiff in 1851 was not taken as a security, but upon an absolute sale, the plaintiff could have had no interest afterwards in the equity of redemption, and would have had no right to redeem, and would not have been the proper person to be made defendant in the foreclosure suit.

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But what the plaintiff relies upon as most material in his favour, and seems indeed to insist upon as decisive, are the two affidavits of *Charles Thompson*, sworn to respectively on the 10th and 19th December, 1853, and filed in the foreclosure suit of *Washburn* v. *Walker*. We have to consider what those affidavits fairly import, and what effect they can have as evidence that can affect *Bernard's* right in this suit.

The first of the two affidavits, it will be remembered, contains no statement respecting the deed of October, 1851; but it is fairly to be implied by it that *Thompson* recognised the plaintiff to be then (in December, 1853) the person entitled to redeem the property and the person interested in redeeming; and it was made for the express purpose of serving and protecting his interests in that capacity, by procuring for him a longer day than had been set for redeeming by the order made in that cause. It states that the mortgaged premises were worth

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more than double the sum found due and payable to the plaintiff, Mrs. *Washburn*. "I am making exertions on his behalf," Mr. *Thompson* states in that affidavit, "to raise the money." * * * "And I further say that I do verily believe that if the time be extended for the redemption of the premises for a period of six months, the said defendant *Walker* will be enabled to redeem to same." Now, if the deed, made more than two years before by *Walker* to *Bernard* and *Thompson*, were really intended to operate as an absolute sale to to them of all *Walker's* interest, which is what it purports to be, then it would be altogether inconsistent with that state of things, that *Thompson* should, in December, 1853, be representing himself as making exertions on *Walker's* behalf to raise the money for Mrs. *Washburn*, in order to enable him to redeem the property. *Walker* might indeed be liable under a covenant or bond for the mortgage money after he had parted with his equitable interest, but he still would not be the person entitled to redeem the property; and *Thompson* and *Bernard* would have been the proper parties to the foreclosure suit, instead of being content to appear as witnesses or friendly agents merely intervening for the protection of *Walker's* estate in the land.

Judgment.

But the other affidavit, made in the same suit by *Thompson* a few days afterwards, is more clearly and expressly applicable to the deed of October, 1851; for in it *Thompson* states on oath, clearly in reference to that deed, that by it *Walker* conveyed to them (*Thompson* and *Bernard*) his equity of redemption of and in the mortgaged premises, "upon trust, or under the agreement or understanding that they should sell the same, and pay off and discharge the mortgaged security held by the plaintiff, (in that suit Mrs. *Washburn*,) and the moneys due or to become due to him and *Bernard* under and in relation to their suretyship to the City of Toronto, together with all costs, &c., and then to pay the surplus of such purchase moneys to the said defend-

ant *Walker*. And *Thompson* further states in this affidavit: "During the course of last summer I have been in continual communication with the said defendant (that is *Walker*) on the Island of St. Joseph, in Lake Huron, and have had many conversations with relation to the said mortgaged premises, and have been fully authorised by him to act in the said matter, and to proceed in the matter of the redemption of the said premises for his interest, and as agent for him, as well as on the behalf of myself and the said *Hiram Goodwin Bernard*."

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This is a very plain recognition by *Thompson* that he and *Bernard* held the land, not as purchasers on an absolute sale, but upon the trust or understanding that they should sell it for the purposes mentioned, and pay over the surplus to *Walker*. And it is an express admission that *Walker*, standing in that relation, had a right to redeem by paying the charges referred to, which of course would render a sale by him unnecessary. It is not inconsistent with that that he should state, as he did in this affidavit, that he was acting in the matter of the redemption of the premises for *Walker's* interest and as agent for him, as well as on behalf of himself and *Bernard*; for he and *Bernard* were indirectly interested in staying the foreclosure, either that a sacrifice of the property might be prevented by giving them more time to sell, or that they might have more time to pay off Mrs. *Washburn's* mortgage themselves, if that should turn out to be necessary.

Judgment.

There can be no doubt that this affidavit of Thompson would be sufficient to establish as against him—if he were living, and a defendant in this suit—that the transaction of October, 1851, was not in fact an absolute conveyance upon a sale, or a final relinquishment of all right in consideration of the debt still due, but was intended to be used as a security by enabling the grantees in the deed to sell the property, and, after retaining the amount of their demand, to pay over the surplus to the grantor; and it is sufficient now to establish the fact

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in a suit against his devisees in trust representing the estate, who alone have been made defendants in regard to the interest that can be derived under him.

But it is denied that this affidavit of *Thompson* is evidence that can be made any use of to affect *Bernard*, the grantee in the deed. If, on the face of the deed of October, 1851, the grantees could or rather should be regarded as joint tenants, then there are many authorities to establish that the admissions of one would be binding upon the other in regard to the property and rights held by them jointly. I refer to *Taylor* on Evidence, sections 674, 680, 681, 683, 686, 691, 712; *Lucas* v. *Delacour*, (*a*) *Crosse* v. *Bedingfield*, (*b*) *Kemble* v. *Farren*. (*c*) In this case, even on the face of the deed, the grantees would not be joint tenants by our law, but tenants in common only, because there is nothing expressed in the deed which indicates an intention to make a joint tenancy. (*d*) Then, holding them to be tenants in common, I do not find that the admission of one would on general principles be binding on the other; on the contrary, it has been held that such an admission would not be binding against the co-tenant in common, though both are parties on the same side of the suit. (*e*) As a general rule, indeed, such an admission of one co-tenant should not be binding on the other; for admitting in this case the truth to be that the deed was really intended by all parties to be an absolute conveyance, as it imports, it would be hard and unjust that the owner of a several interest held under it should have that interest cut down to a security only, because the owner of the other moiety had chosen for any purpose to deny that the intention was such as the deed expressed.

Judgment.

On the other hand, it would be arriving at a strange result in this suit if the deed under the same words,

(*a*) 1 M. & Sel. 249. (*b*) 12 Simons, 35.
(*c*) 3 Car. & P. 623.—Per *Tindal*, C. J.
(*d*) Con. Stat. U. C., ch. 82, sec. 10.
(*e*) Taylor on Evidence, sec. 681; 4 Cowan, 488, 492.

applying to both grantees, must be held on any evidence of the intent with which it was made at the time to have conveyed to one grantee an absolute estate, and to the other a qualified or conditional estate only. For nothing can be plainer or more certain than that, for whatever purpose the estate was conveyed to one grantee, it was for the same purpose conveyed to the other. And I have not brought myself to the conclusion that we could upon any evidence given in this cause, hold this deed to have been a sale as to *Bernard*, but only a security as regarded *Thompson*. The common sense view of the point seems to be, that if the court are satisfied of the truth of the statement, that the deed was made as a security only for one purpose, and as to one party in the cause, it must, for any thing that appears in the case, be held to be so for all purposes, and as to both parties. That *Bernard* could have been allowed to disprove the statements made by *Thompson*, I have little doubt. That, however, would seem to call for a decision between the opposing testimony, but a decision that of necessity must govern the whole case, since the whole was one transaction, which could not at the same time have been absolute and conditional or clothed with a trust; but, for all purposes in the cause, must be taken to have been either the one or the other, according to the conviction of the court upon the evidence. On this part of the case I think it material to refer to the case of *Pring* v. *Pring*. (*a*)

Judgment.

Mr. *Starkie*, in his treatise on evidence, observes, "that a community of interest or design will frequently make the declaration of one the declaration of all."

"Thus," he says, "in the case where partners or others possess a community of interest in a particular subject, not only the act and agreement, but the declaration of one in respect of that subject matter, is evidence against the rest. The admission of one of several

(*a*) 2 Vernon, 99.

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makers of a joint and several promissory note that it has not been paid, is evidence against all. Such an admission, however, ought to be clear and unequivocal." He cites as authorities for this principle, 11 East, 589, and 1 Maule and Selwyn, 249, which I have already referred to; and *Whitcomb* v. *Whiting*. (*a*) Unless, indeed, this principal were acted upon, the judgment of the court must, or at least might, in many cases be contradictory and inconsistent, and beyond question wrong in one part, if it be right in another.

On the other hand, it is laid down in Mr. *Taylor's* treatise on evidence, section 680, that in order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were jointly interested, or one was derivatively interested through the other; and that a mere community of interest will not be sufficient; and he cites a decision of Lord *Ellenborough* at *nisi prius*, in *Jaggers* v. *Binnings*, (*b*) where an action was brought against two defendants, part owners of a vessel, and an admission made by one as to a matter which was not a subject of co-partnership, but only of co-part-ownership, was held inadmissible against the the other.

Judgment.

If it had been explained in that case, which it is not, what was the tendency of the rejected admission, we might have seen that there was an obvious propriety in rejecting it, and that the decision could not be applied as an authority in the case before us.

But whatever difficulty there may be in the way of receiving evidence of *Thompson's* written admission in his affidavit, as binding *per se* upon *Bernard*, his co-tenant in common, especially in view of what is required by the Statute of Frauds, I feel the case to be clear on the ground on which the plaintiff's counsel put

(*a*) Douglas, 652. (*b*) 1 Stark, Rep. 64.

it on the argument, namely, that the defendant, *Bernard*, has by his conduct in respect to this transaction given sufficient reason to conclude that the transaction which took place at St. Joseph's Island, in October, 1851, could not have been one of absolute sale of this land, and that there is sufficient foundation laid for the reception of parol testimony, in order to explain for what purpose the deed in question was then made by the plaintiff, *Walker*.

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If it had been proved in the case that *Bernard* stated publicly, at the auction sale that was attempted to be made, that they held the land in security for their claims upon the plaintiff, and were selling the land for the purpose of satisfying these claims, and paying over any surplus there might be to the plaintiff; that they had computed their claims at a certain sum, and would, therefore, put up the land at that price, in order that it might not be sacrificed for a sum less than would satisfy the debt; and if the land, at his desire, had been in fact put up at that upset price, I assume that that would not, in the view of a court of equity, have been treated as mere verbal declaration of matter, contrary to the purport of the deed. It would have been treated as something actually done on his part inconsistent with the state of things to be inferred from the deed, and would have let in any further parol evidence to show what the real nature of the transaction was. It appears to me that what *Bernard* actually did, and participated in, was conduct on his part stronger than I have just supposed. He allowed *Thompson* to take the principal part in obtaining the deed from the plaintiff, at St. Joseph's; left him to make the previous arrangement about it with the plaintiff; went up with *Thompson*, at his request, and when he arrived there, left it with *Thompson* to negotiate the matter with the plaintiff, waiting, apparently, to abide by what *Thompson* should procure the plaintiff to do. They held, already, a mortgage from the plaintiff upon the same property, given

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to them a year before, to secure them against the consequences of the liability which they had incurred on his account; and I cannot see why they should have desired to get this other deed for the mere purpose of security, if that were their only object, (which, indeed, is a difficulty in the way of supposing that the latter deed was meant to operate as a security only,) except that the mortgage of 1850 required ninety days' notice of any sale to be made by them for the purpose of indemnifying themselves; and they may have desired to act more promptly. But this result is plain, that *Thompson*, being allowed by *Bernard* to put himself forward, as he did in the matter, they came away with this absolute deed in consequence of what passed between the three; and two years afterwards, when Mrs. *Washburn* was endeavouring to foreclose upon her mortgage, of much older date, the proceedings take place which Mr. *Turner* relates in his evidence. Upon all that is before us in relation to what was done in that suit by *Thompson* and *Bernard*, and the now plaintiff, *Walker*, for obtaining a longer day before foreclosure, *Bernard* seems again to have allowed *Thompson* to be the acting party of the two in whatever was necessary for obtaining their common object.

Judgment.

Whether he did or did not know the exact contents of the affidavits made by *Thompson*, does not precisely appear; but upon the evidence before us, I think no jury would hesitate a moment in concluding that *Bernard* was concurring in the statements made by *Thompson*, so far that he knew, and acquiesced in them; that having a common interest, they were acting together in the common object of obtaining further time for the protection of *Walker*, as holding the equitable estate of a mortgagor, entitled to redeem for his own benefit. The defendant, *Bernard*, does not pretend that he gave any intimation, while he was being examined in the master's office, that he and *Thompson* were the absolute owners of the estate. "I do not

recollect, (he says, in his evidence in this cause) stating in the master's office my reasons for interesting myself; I do not recollect saying that I and *Thompson* were the absolute owners of the land; nor can I account for not doing so, except that I did not know much about the matter; I do not recollect about my evidence; it is ten years ago; my memory is not very good."

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I think we cannot be wrong in looking upon *Bernard*, on a view of all the evidence, as sanctioning the statements made by *Thompson*, and using, as much as he used, the affidavits on which they both assisted in obtaining, as if for the benefit and on behalf of *Walker*, an enlargement of time, which could be of no consequence to *Walker* if he had absolutely and finally parted, as *Bernard* now affirms he did, with all his interest, legal and equitable, in the premises.

Mr. *Turner* swore that all three were acting in this matter in pursuit of their common object.

Judgment.

The principle I now refer to was carried somewhat further in the case of *Drewett* v. *Sheard & Price*, (*a*) where *Littledale*, J., said to the jury, "The learned sergeant says that the defendants are only liable for joint acts, that is, acts done (by *Sheard*) when the defendant *Price* was present. Still, as on the first occasion, both defendants were present, and stated that they acted in the assertion of a right, you will consider whether Mr. *Price* did not sanction and concur in the acts done when he was not present." The act in that case (the re-opening of a ditch which had been filled up) was done by *Sheard* alone, in the absence of *Price*.

It is reasonable upon the evidence of Mr. *Turner*, and upon other testimony in the cause, and considering the privity between these parties, *Thompson* and *Bernard*, through the whole transaction, that we should consider

(*a*) 7 Car. & P. 465.

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Bernard as concurring with *Thompson*, in putting forward the statements contained in *Thompson's* affidavit, as the means of obtaining the end which it is proved they both had in view. The cases of *Brickell* v. *Hulse*, (*a*) *Gardner et al.* v. *Moult*, (*b*) *Boileau* v. *Rutlin*, (*c*) and *Johnson* v. *Ward*, (*d*) are strong to shew, not that *Thompson's* affidavit signed only by him can be held to supply written evidence signed by *Bernard* of the facts contained in it, but that the putting forward that statement by *Bernard*, or with his sanction, is an act done by him quite inconsistent with what he now contends, that he and *Thompson* were to be, under the deed, the absolute owners of the estate as purchasers, without any agreement or understanding that *Walker* should be allowed to redeem. And indeed his active intervention in the foreclosure suit, for the purposes for which he and *Thompson* did avowedly interfere, would without the affidavits have been evidence to the same effect, less strong perhaps and certainly less particular, but sufficient to afford ground for receiving parol evidence as to the real object in taking the deed of October, 1851.

Judgment.

It was on that view of the case that the plaintiff's counsel relied in his argument, and I think rightly.

Then parol evidence being thus let in, according to the principle constantly acted upon in such cases, we have the strong testimony of Mr. *Spragg*, the only subscribing witness to the deed of October, 1851, which may, as it appears to me, be confidently relied upon; for besides that no attempt has been made to impeach his testimony, he seems to be in no manner mixed up with the transaction. Being casually a fellow passenger with *Thompson* and *Bernard*, on board the steamboat, he was requested by *Thompson* to go with them and see the deed executed; and his attention when they got there seems to have been the more given to the matter, from his being requested to make an alteration in the

(*a*) 7 Ad. & Ell. 456.
(*b*) 10 Ad. & El. 464.
(*c*) 2 Exch. 665.
(*d*) 6 Esp. Ca. 47.

deed, which he did, by inserting the name of *Thompson*, in addition to *Bernard*, as a grantee. *Walker*, he swears, read the deed himself, and finding that *Thompson's* name was not in the deed as a grantee, but only *Bernard's*, he objected to it on that account, and, in deference to his objection, *Thompson's* name was added. Now, if there had been no such intention or understanding in *Walker's* mind, as that he was only making this deed as a security, and he was about to execute the deed as a final and absolute transfer of all his right in the land, it could not have signified to him whether *Thompson's* name was in the deed or not. If both had agreed to give up all claim upon him for indemnity, on his executing the deed which *Thompson* placed before him, he might, as we may suppose, have been content to make the conveyance either to one or both, as they might have agreed between themselves. If he had been led by what had passed between him and *Thompson* to believe that the deed was only to be made use of as a means of enforcing payment of the debt due by him to the two, it was natural that he should desire *Thompson's* name in the deed, for he had confidence in him, and would feel more secure that the understanding on which he was about to convey would be more certainly carried out. Then the witness states that, upon *Walker's* wife hesitating to sign the deed, *Thompson* remarked to her, "that the deed would not affect *Walker's* right of redemption; that he still would have a right to redeem, otherwise the property would have been sold to meet liabilities that had been incurred; that it would be sacrificed, and urged this mode of settlement as preferable." "I understood," he says, "it was to raise money to pay off what was due on the place, and other liabilities that were pressing. After this conversation, the deed was executed." Again, this witness swears, "*Thompson*, when he produced the deed, said it was for the purpose of raising money to meet liabilities. It was not said that *Thompson* and *Bernard* were to sell the property, but to raise money on the property."

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The witness *Spragg* speaks here of a transaction that had passed in his presence nearly ten years before; and considering that he had no personal interest in the matter, and no previous knowledge of the circumstances which led to the taking of the deed, his testimony supports as nearly as could be expected in substance the plaintiff's statement in the bill, that the understanding at the time of taking the deed was that it should be and was taken as mere security for the balance that might be due to *Thompson* and *Bernard* on taking the accounts between them and him; and that it was agreed that the indenture, though absolute in form, should be and was in fact a mere security for the purposes aforesaid. It supports also substantially the statements in *Thompson's* affidavit, made on 19th December, 1853, that *Walker* conveyed to him and *Bernard* his equity of redemption in the mortgaged premises, upon trust, or under the agreement and understanding that they should sell the same and pay off and discharge the mortgage security held by Mrs. *Washburn*, (upon which she was pressing,) and the moneys due to *Thompson* and *Bernard* under or in relation to their suretyship for *Walker*, and to pay the surplus of such purchase money to *Walker*.

Judgment.

It has been objected that the case made out in evidence varies from that stated in the bill, and does not warrant the kind of relief which the decree gives; for that the tendency of the evidence is to establish a trust, rather than a mortgage, that is, a trust to sell the estate and pay over to *Walker* any surplus above the debt due by him; or a trust to raise money upon the estate, otherwise than by sale, in order to pay off the debt due.

But take it either way, the substance and effect is that the land was conveyed, not absolutely and unconditionally, but by way of security, as the bill asserts; and whether the intention was to give power to sell the land for raising the money, or to mortgage it for the same purpose, *Walker*, in either case, would hold an interest in the property, and the grantees would not

be suffered to proceed to a sale or mortgage against *Walker's* will, if he were able and offered to pay them the money he owed.

The substance of the case is, whether the plaintiff has upon the evidence a right to come for redemption; and it was so regarded in *Cripps* v. *Jee*, (*a*) where the circumstances were in principle similar; and I doubt not in many other cases, where what might be spoken of properly as a trust pointed only to realizing a debt out of the property, and paying over any proceeds to the plaintiff. The reasons assigned for appealing do not rest the appeal upon any such distinction, but simply on the ground that there was nothing to shew the deed to be conditional or by way of security, or any thing but an absolute sale.

That is quite true as regards the form of the deed, but not true in a larger sense.

Judgment.

It is true that the defendant *Bernard* does in his answer most distinctly and positively deny that the deed was taken as a security; but the rule of evidence, which requires more than the testimony of a single witness to overcome his unqualified denial, is in my opinion abundantly complied with here by the corroboration which *Spragg's* evidence receives from the other testimony relied upon. I refer to 2 Maddock's Chancery, 580 (note *b*.)

In my opinion the appeal should be dismissed with costs.

DRAPER, C. J., said that although he had written out his views on this case he thought it unnecessary, after the very clear exposition of it given by the learned president, that he should delay the court with any lengthened statement of the facts, or to say more than

(*a*) 4 Bro. C. C. 472.

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that subsequent reflection had failed to change the opinion which he entertained at the conclusion of the very able argument of Mr. *Strong*, by which he was impressed with the idea that the transaction which took place between these parties, if not an absolute sale was one of trust, the nature of which not having been evidenced by any writing signed by the party is void under the statute, and therefore that the appeal should be allowed, and the bill in the court below dismissed with costs.

ESTEN, V. C., thought the decree pronounced in the court below was right, and that the appeal should be dismissed with costs.

Judgment.

The other members of the court concurred.

Per Cur.—Appeal dismissed with costs.

[DRAPER, C. J., *dissentiente.*]

EVANS v. EVANS.

Specific performance—Laches.

In the year 1850, the owner of 100 acres of land, with the view as was admitted of retaining his son upon the property and settling him in life, agreed to convey to him in fee simple 50 acres of this land, worth at least £150, upon payment of £50, payable in six years without interest, and executed a bond for that purpose. After obtaining this bond, the son went to work about the country, and resided some years at a distant part of the province, sometimes returning when out of employment and residing with the other members of his father's family, and during such residence was in the habit of assisting in doing the usual work of the farm. Nothing was ever paid on account of the purchase money, although it was alleged the son was entitled to a credit on account thereof for services rendered. After the lapse of a period of about ten years a bill was filed by the son to enforce a specific performance of the contract evidenced by the bond, and a decree was pronounced in favour of the plaintiff. Upon an appeal to this court this decree was reversed, and the bill in the court below dismissed with costs, unless the plaintiff should within one month deliver up the bond to be cancelled, in that event the dismissal to be without costs. [DRAPER, C. J., and ESTEN, V. C., dissenting.]

The bill in this cause was filed by *Thomas Evans* against *George Evans*, setting forth, that in April, 1850,

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defendant had agreed to sell and convey to plaintiff 50 acres, part of lot number 24, in the first concession of Albion, for the price of £50, payable according to the terms contained in the recital to a bond executed by the defendant to the plaintiff on the occasion of such sale, and which bond was set forth at length in the bill; that after the execution and delivery of this bond, the plaintiff, at defendant's request, agreed to serve defendant as a labourer on his farm, the remuneration for which was to be applied upon and form part of the payment of the purchase money of the land; that under the agreement, plaintiff had so worked for twelve months—such services being worth £30; that it was also arranged that plaintiff should pay the taxes on the land, he first being let into possession and enjoyment thereof; that accordingly, about twelve months after the execution of the bond, plaintiff applied to defendant to be let into possession, which was refused, and defendant continued to retain the possession thereof. The bill also charged that plaintiff had another claim against defendant, on a promissory note for £30, with interest thereon, such sums in all amounting to much more than was due to defendant in respect of the purchase money agreed to be paid; and prayed specific performance of the contract, and an account of what was due.

Statement.

The defendant answered the bill, admitting the contract alleged, but stated that, at the time of entering into it, the property was of much greater value, and that his sole reason and inducement for agreeing to sell it for so small a sum was, as the plaintiff well knew, to endeavour by that means to keep the plaintiff on the farm, instead of suffering him to go to the United States or some other part of the country; but denied that plaintiff had served him as alleged, but, on the contrary, that immediately after the contract left and went elsewhere, and had never remained on the farm as had been intended; that plaintiff had never complied with the terms and conditions of the bond by payment of the

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consideration money or taxes, and that therefore he (plaintiff) was not entitled to any relief. The answer further stated that, about the year 1856, and after the time limited for payment had elapsed, defendant set up the plaintiff and his sister in a tavern belonging to defendant, where he remained for about a year, when he left, at which time he made a claim against defendant for boarding some of his workmen, and that in consequence defendant gave plaintiff the note for £30, at which time plaintiff did not assert any claim to the property, or to have the note credited on the bond, and which defendant submitted was evidence of plaintiff having abandoned the contract: that the claim of plaintiff was a stale demand, and that by reason of plaintiff's laches the same could not be enforced.

Statement.

The answer further stated, that on the 26th January, 1859, the defendant being in want of money, and supposing that plaintiff had abandoned all claim to the property, had mortgaged the same with other lands to one *Stephen S. Lee* and *Allan Cameron*, for $900, of all which the plaintiff was aware, as defendant verily believed.

Evidence was gone into; that on the part of the plaintiff, being chiefly with a view of shewing that he had complied with the stipulation agreed upon between the parties of working for the defendant: one *Evans*, a relation of the parties, swore that about the 6th of February, 1861, he went with plaintiff to defendant in order to make an arrangement of the differences before suit, when defendant refused to give the deed, and said if plaintiff waited till defendant's death he would give plaintiff his share; that the witness tendered defendant $55, which was the balance due on the land, after deducting six months' labour ($66) and a note of $88 with interest on it ($19;) that on this occasion defendant stated he had offered plaintiff $1000 and some farming utensils in lieu of the 50 acres; that he would

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like to keep the land, for which reason he had made the offer. This witness said the place was worth $1600, some time being given; that he did not know where plaintiff lived after getting the bond. *John Lyndsay*, a witness for plaintiff, proved that in the fall after the bond was given, plaintiff was working for defendant; that he had heard defendant offer the $1000 and farming implements to plaintiff; that at the time of the bond the land was worth $1000, and that he had heard defendant say in presence of plaintiff that he was selling him the land to keep him at work. *Ellen Matthews* (sister to plaintiff and called by him) swore that she had heard plaintiff and defendant converse about the land; plaintiff had been working off and on for defendant before the bond was given; she had heard her father speak about the bargain; he always allowed he would give the land to the plaintiff; about a year after the bond, the defendant said that if plaintiff would settle and marry he might go upon the land; that she had seen plaintiff working for defendant since the bond was given—could not say how long; that plaintiff had been back and left defendant frequently; that he was more frequently away than at home during the last four or five years, and that about six years ago she had heard plaintiff complain of not getting possession of the land. Other witnesses called by the plaintiff proved that defendant had always desired to keep the land in his family; that he had stated he would rather pay the money ($1000) than break the farm, as thereby he might get a bad neighbour; that plaintiff had been in the habit of working for other people; that he stayed at his father's house when out of work, but worked while there.

Statement.

The plaintiff was examined by the defendant. On his examination he swore that the bond had been given for work done before 1850, after that he was to have wages, which were to be applied to the land, which he was to get possession of after a year. One witness (*Hessy*)

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called by the defendant, stated that plaintiff had been living at the Grand River for about four years, and while there witness had a conversation with him, in which he stated that he thought he would never return home; that he had some claim against his father, but he did not like to put it in force, because he did not think it was his right, and his father was not able to pay it or suffer the loss; he did not say what the claim was, and witness did not ask him.

The cause came on to be heard before his Honor Vice Chancellor *Esten*, on the 25th of January, 1862, when a decree was made, by which it was declared "that the plaintiff is entitled to a specific performance of the contract in the bill of complaint of the said plaintiff in this cause set forth, upon payment of what shall be found due by the plaintiff to the defendant in respect of the purchase money agreed to be paid therefor, subject, however, to the mortgage security in favour of *Stephen S. Lee* and *Allan Cameron*, in the said bill mentioned, and doth order and decree the same accordingly; and it is ordered that it be referred to the master of this court to take an account of what is due by the plaintiff to the defendant for the purchase money of the said land and premises; and in taking such account he is to set off and allow against such purchase money whatever he may find to have been the value of the services (if any) rendered by the plaintiff for the defendant at any time subsequent to the date of the contract, and also to set off and allow against such purchase money any sum or sums of money he may find due from the defendant to the plaintiff upon any other contract or consideration, and also in like manner to set off and allow against such purchase money and interest the costs of plaintiff to be taxed by the master, and upon payment by the plaintiff to the defendant of any balance which shall be found due to him upon taking such account, it is ordered that the defendant do execute a good and sufficient deed of conveyance in fee simple to

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the parcel of land in the said bill mentioned, being, &c.; such conveyance to be settled by the master of this court in case the parties differ about the same, and the said defendant undertaking to satisfy and discharge the said mortgage in favour of *Stephen S. Lee* and *Allan Cameron* according to the requirements thereof. This court doth order and decree that the defendant do satisfy and discharge said mortgage, and in the event of the master finding that the amount due in respect of the purchase money and interest is insufficient to balance the amount which shall be found due to plaintiff, including the costs aforesaid, it is ordered that the defendant do pay the plaintiff the amount of the deficiency, such deficiency not however exceeding the costs which shall have been so taxed and allowed to the plaintiff. And this court doth reserve the consideration of further directions and of subsequent costs."

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From this decree the defendant appealed for the following reasons:

Statement.

1st. Because the court should have declared that the contract in the pleadings mentioned had been abandoned by the parties, and should have therefore refused specific performance.

2nd. Because from the laches of the respondent the court should have refused him any relief.

The respondent, in support of the decree, assigned the following reasons:

That the decree made by the court cannot be appealed from, inasmuch as it orders the payment of money, an account whereof has not been taken, and to secure the payment whereof the appellant has not made the requisite provisions. That as the decreeing or refusing specific performance of a contract is discretionary, this court would not interfere with the judicious exercise of that discreton by the court below, to whom the same pecu-

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liarly belongs, and that, therefore, there is no error in the said decree.

That there was no abandonment by the respondent of the contract whereof specific performance was decreed by the said decree in the court below, and no evidence of any such abandonment was furnished or offered in the court below.

That there were no laches to disentitle the respondent to the relief granted to him by the said decree.

That if there was any error in the said decree the appellant ought to have caused the same to be re-heard before the full court below.

The appeal coming on to be heard,

Mr. *Blake*, and Mr. *G. D. Boulton*, for the appellant.

Argument.

Although the lowness of the price agreed to be paid for the land may not of itself be sufficient as a ground of defence, it is certainly material when taken in connexion with the other considerations which arise in the case—such as settlement by the plaintiff on the property for it is perfectly clear from all the evidence that this object was the main if not the sole moving cause for the father agreeing to convey to the son. On this understanding the bond was executed, and this may be shown by parol as a defence to a bill seeking specific performance.—*Beaumont* v. *Dukes*, (*a*) *Myers* v. *Watson*. (*b*)

The application for and refusal of possession occurred as stated by the bill, in 1851, was a sufficient repudiation of the contract, and yet no proceeding is taken to enforce the contract for ten years afterwards: this was such laches as should disentitle the plaintiff to any relief in a court of equity: *Hook* v. *McQueen*, (*c*) shews that the execution of the mortgage to *Lee* and *Cameron*, with the knowledge of the plaintiff, was strong evidence of the abandonment.

(*a*) Jac. 422.
(*b*) 1 Sim. N. S. 523.
(*c*) 2 Grant. 490.

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Mr. *Blevins*, for the respondent, referred to *Norway* v. *Moore*, (*a*) as to the effect of a statement in the bill being contradicted by evidence. *Carolan* v. *Brabazon* (*b*) shews that to prove a defence on the ground of abandonment, the fact of abandonment must be proved as clearly as the original agreement. He cited *Clark* v. *Hart*, (*c*) *Fry* on Spec. Per. 306; Sug. V. &. P. Ss. 211, 212.

Judgment.

Sir. J. B. Robinson, Bart.—I think there is nothing in this case which stands in the way of a determination by this court of the question whether it is not consistent with equity that the plaintiff should have a decree for specific performance. As to the reference to the master which the decree contemplates, that would not be upon any point material to our forming a judgment upon the main question. The necessity for such reference is dependent on the decree for specific performance being upheld.

Then as to the ground of objection to the appeal, that it was discretionary with the court to decree performance or not, and that there can be no appeal from the exercise of mere discretion. That is true in a limited sense, but not universally, or there could scarcely be an appeal in any suit of this description; whereas, we have had many, and shall not improbably have to dispose of more. It is no doubt within the authority of an appellate jurisdiction to determine in this case, as in others, whether the judgment of the court of equity, in a matter which may be admitted to be in some measure discretionary, has been given in accordance with the general principles which in such cases govern courts of equity. It need hardly be said that a judgment decreeing specific performance may in many more instances be found the subject of an appeal than a judgment refusing it. This is an order of the former kind.

(*a*) 5 Grant, 609.
(*b*) 8 J. & Lat. 200.
(*c*) 5 Jur. N. S. 447.

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This case should not, in my opinion, be looked upon as if the transaction were entirely one of business—in which the motive of each party is, for all that appears, to get an equivalent for what he gives. This is a bill filed by a son against his father, to compel him to carry into effect an agreement, positive enough no doubt on the part of the father, but in which the son has lost all remedy at law by most unreasonable negligence and delay.

It does not appear that the defendant exacted any undertaking from the son to pay the sum of money mentioned in the defendant's bond as the consideration for the land which he was to convey, or any undertaking to pay the taxes.

All that we see or hear of, is a bond from the defendant to the plaintiff, that he will make him a deed of the land in question, fifty acres in the township of Albion, provided the plaintiff should pay him £50 in six years, from the 1st September, 1850, that is to say, £10 on 1st September, 1852, and the remaining £40 in four equal annual instalments, on 1st September in each of the four years following, so that the whole price should be paid by 1st September, 1856, and the plaintiff was in the meantime to pay all taxes on the fifty acres. The agreement, therefore, properly speaking, was all on one side, and that is a material feature in the case.

Judgment.

At the time that the defendant thus bound himself to convey to his son these fifty acres for £50, to be paid in six years, the land, it appears by the evidence, was well worth £150, and is now worth from £300 to £400.

It is quite plain that there must have been some particular purpose to be answered to the father by selling to his son fifty acres of the same lot on which he lived for a third of its value. I have no doubt that the object was that which is indicated in the evidence, and is in

some measure admitted by the plaintiff, namely, to keep the son from wandering about, labouring for strangers, or wasting his time perhaps more unprofitably. 1862. Evans v. Evans.

Or it may have been that the motive also entered into his father's mind of making in this manner a provision for this son, in proportion, perhaps, to what he might be able to give to his other children, for the land given to him upon these easy terms would be in a great measure a gift.

These considerations apply strongly against treating this as an agreement to be enforced against the defendant by any active interference of a court of equity, where the son is chargeable with great laches in omitting to do what he was bound to do, in order to bring himself within the terms of his father's bond.

On considering the whole evidence, I find it not easy to satisfy myself what labour the son had done for the father after the execution of the bond, which the father afterwards agreed to allow for as part payment of the £50. It is very imperfectly proved, and the evidence that is given is contradicted. Judgment.

The cases which are referred to in Mr. *Fry's* work on Specific Performance, chapter 24, are very strong to shew that the court should not lend its aid to the plaintiff to enforce specific performance against the father, after a delay of so many years, where the plaintiff has not in the meantime been in possession, and has made no improvements, and has neglected so long to enforce the agreement after he had, as he admits, full notice that his father, in consequence of his negligent conduct, intended not to consider the agreement still in force which had been so long disregarded, that is, I mean the specific agreement to convey the land, though he had offered no alternative.

I think the decree should be reversed, and the

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bill dismissed with costs, though, if my brothers concur, I should have no objection to follow the course taken in *Spurrier* v. *Hancock*, (*a*) by adding, "unless within one month the plaintiff should deliver up the agreement;" and in that case without costs.

DRAPER, C. J.—I can see nothing in this case to take it out of the general rule, that the specific performance of an agreement for the sale of lands should be decreed. I think, for the reasons assigned by the learned Vice-Chancellor, the decree should be affirmed, and the appeal dismissed with costs.

ESTEN, V. C.—I think the decree pronounced by me in favour of the plaintiff should be affirmed. The estate was sold at an undervalue by the father to a son, who had acted towards him in a praiseworthy manner, but for a substantial consideration, and this circumstance can therefore form no bar to a specific performance. The bond is proved, and constitutes a valid contract within the Statute of Frauds. The only defence, then, which can be raised to the suit is abandonment or laches on the part of the plaintiff. The defendant was anxious to keep his son in the neighbourhood, and see him married and settled. I am satisfied that he never intended to rescind the contract. The plaintiff paid a substantial part of the consideration, and at the end of the year asked for possession; when the defendant said that if he would marry and settle he would admit him into possession. The plaintiff was not prepared at that time to marry, and time passed, the plaintiff and defendant having dealings with each other. The defendant never notified the plaintiff that if the contract was not performed he would rescind it. He brought the land into cultivation, intending, probably, the plaintiff to have the benefit of it when he should settle. During this time the plaintiff left the bond in the hands of *George Evans*, with instructions to press it, but he did not, and

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(*a*) 4 Ves. jr. 667.

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Mrs. *Matthews* took it away. On the plaintiff's return from the Grand River he pressed his claim, and the defendant, not insisting that the contract was at an end, made a very advantageous offer of compromise to the plaintiff. Upon the whole, considering the circumstances of the case, and the relation existing between the parties, I think no abandonment is shewn, and no sufficient laches exist in the present case to debar the plaintiff from the relief he seeks. I do not attach any weight to the declaration of the plaintiff, as mentioned in the evidence of *Hessy*, although I think he was speaking the truth to the best of his recollection. Mrs. *Hessy* exhibited a good deal of feeling in delivering her testimony. She was only ten years old at the time of the transaction which she relates. The defendant should have acquiesced in the demand of the plaintiff, and accepted the money which he tendered to him.

I think the appeal should be dismissed, and with costs.

Judgment.

HAGARTY and MORRISON, JJ., concurring in the views expressed by the president, the appeal was allowed, and the bill in the court below ordered to be dismissed.

McQUESTEN v. THOMPSON.

T., K. & Co., carrying on business as gas-fitters and plumbers, contracted verbally with D., an hotel-keeper, to supply a new hotel he was erecting with various articles in the way of their trade, which was to be paid for as the work progressed. D. afterwards left this province on account of ill health, having previously executed a power of attorney to one S., authorising him to carry on his business during his absence. T., K. & Co. having discovered that D.'s estate was greatly involved, refused to proceed with their contract, unless secured for their work and materials. Whereupon S., with a view of inducing T., K. & Co. to complete their contract, in pursuance of a previous arrangement, executed, as such attorney, a chattel mortgage of the goods furnished by them, securing to T., K. & Co. payment of their demand. At the time of the execution of this instrument D. was dead, but this fact was not known to the parties until some time after the completion of the work. *Held*, reversing the decree of the court below, that T., K. & Co. were not, under this mortgage, entitled to remove any of the fittings put in the hotel; their only remedy being for the price of their work and material under their contract with D.

Jacques v. *Worthington*, 7 Grant, 192, commented on, distinguished from the present case, and approved of.

The bill in the court below, as amended, was by

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James E. Thompson, *David S. Keith* and *Charles C. Thompson*, against *George Worthington*, *Calvin McQuesten* and others, praying, under the circumstances therein stated, and which are clearly set forth in the judgment of the court, that the personal representatives of *Thomas Davidson* (defendants to the bill) might be ordered to make and execute a mortgage similar to the one which had been executed by *Stevenson* as his attorney, and pay off certain incumbrances due to others of the defendants; and that defendant *McQuesten* (a mortgagee in possession) might be ordered to deliver to the plaintiffs all the goods put or placed by them in or on the hotel and premises in the bill mentioned, subsequently to the death of *Davidson*; that the defendants might be restrained from using or permitting to be used the said goods and materials, and for further relief.

Statement.

On the cause coming on to be heard, before his honour Vice-Chancellor *Esten*, a decree was pronounced directing "that the defendants to the original as well as to the amended bill do forthwith deliver to the plaintiffs at the Royal Hotel in the city of Hamilton in the pleadings mentioned, all the goods placed by the plaintiffs or their servants or agents in or about the Royal Hotel subsequent to the 30th day of December, A.D., 1857, and which remain in the condition of mere chattels; such goods to be ascertained by the master of this court at Hamilton, in case the parties differ about the same. And this court doth declare that the said plaintiffs are also entitled to such goods as, having been so delivered subsequent to the said date, and having been affixed to the freehold, can be removed therefrom without injury to the inheritance. And it is further ordered that the plaintiffs be at liberty, at their own expense, to remove the same, restoring the premises as nearly as circumstances will admit to their former condition. And this court doth declare that the said plaintiffs are not entitled to such of the said goods as cannot be removed without injury to the inheritance as

against the defendant, *Calvin McQuesten*, until he is paid his debt and costs. And it is ordered that the defendants, *George Worthington*, *Anthony Copp*, and *James Miller* (the administrators of *Thomas Davidson*) do forthwith pay to the plaintiffs their costs of this suit, up to and inclusive of the former hearing of this cause, to be taxed by the master of this court at Hamilton; and as to the proceedings subsequent to the original hearing of this cause, this court do not think fit to give costs to any of the parties hereto; and all the parties are to be at liberty to apply to this court, as occasion may require; and the costs of the reference hereby directed as to the said goods are reserved until after the master makes his report. And as to such goods as cannot be removed without injury to the inheritance, this decree is without prejudice to any question of compensation or otherwise as between the plaintiffs and the estate of the late *Thomas Davidson*."

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Statement.

From this decree the defendant *McQuesten* appealed, making the other defendants to the bill and the plaintiffs respondents, assigning as reasons for such appeal—

1st. Because, as to the pure chattels, the only and sufficient remedy of the respondents, *James E. Thompson*, *David S. Keith*, and *Charles C. Thompson*, is at law, and the Court of Chancery has no jurisdiction to interfere, or, if it have such jurisdiction, this is not a proper case for the exercise thereof.

2nd. Because, as to all fixtures, the same upon their fixture became the property of the appellant, whose title thereto was not and could not be affected by the alleged agreement under which the same were affixed.

3rd. Because the alleged mistake in fact, upon which the said decree is founded, could not affect the legal result of such fixture, and the parties are practically in the same position as if there had been no such mistake in fact.

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4th. Because the agreement for a chattel mortgage was as to fixtures manifestly void in law against this appellant, and therefore no equity can be raised in favour of the respondents, *James E. Thompson*, *David S. Keith*, and *Charles C. Thompson*, on the ground that the said agreement turned out void on other grounds.

5th. Because the respondents, *James E. Thompson*, *David S. Keith* and *Charles C. Thompson*, affixed the said goods with a full knowledge of the appellant's legal rights, and of his intended assertion thereof, and they should not be relieved against such rights and their assertion.

6th. Because the said decree is founded on rights alleged to arise in respect of an agreement dated on the 6th day of January, A.D., 1858, and the relief granted should have been confined to goods supplied on or after that date, whereas the said decree extends to all goods supplied on or after the 30th day of December, A.D., 1857.

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7th. Because the said decree should have directed an account or enquiry as to what, if any thing, is due the said respondents, *James E. Thompson*, *David S. Keith* and *Charles C. Thompson*, in respect of the goods supplied by them, and should not have directed their unconditional restoration, but should have reserved that question until after the state of the accounts had been ascertained.

8th. Because the said decree should have directed the respondents, *James E. Thompson*, *David S. Keith* and *Charles C. Thompson*, upon removal of any of the said goods, to place the premises in the same condition in which they formerly were.

9th. Because the said decree should have provided, but does not provide, any means for carrying out its provisions, by ascertaining what fixtures, if any, can be removed without injury to the inheritance.

The plaintiffs assigned, in support of the decree, the following reasons:

1. There is jurisdiction in equity as to the pure chattels, and this is a proper case for the exercise thereof; and if there is a remedy at law, it is not an adequate remedy under the circumstances of the case; and even assuming that there were no jurisdiction in equity in the case of pure chattels, there would be jurisdiction in this case, because of part being fixtures, and not pure chattels, by reason whereof jurisdiction is given as to the whole.

2nd. The fixtures did not, nor did any of them upon their fixture, become the property of the appellant, but the property always remained in the respondents by virtue of the agreement under which the same were affixed.

Statement.

3rd. The mistake in fact could and did affect the result of such fixtures, and but for such mistake the fixtures would not have been affixed or the goods forming such fixtures been delivered, and consequently the parties are not in the same position as if there had been no mistake in fact.

4th. The agreement for a chattel mortgage showed the intention to preserve the subject matter as chattels, and not to allow the property to pass; and such intention must be carried out, not only between the parties, but also as against the appellant; for, among other reasons, he did not lend his money nor was he otherwise induced to alter his position because of the subject matter being supposed to become fixtures, and particularly the appellant would have been in as good a position as he is if the said subject matter had never been put upon the mortgaged premises.

5th. The respondents were not aware of the ap-

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pellant's legal rights, or of his intended assertion of them; but if they were, they ought not, under the circumstances of this case, to be precluded from the relief granted by the decree.

6th. The relief is not founded solely on rights in respect of the agreement of the 6th January, 1858, but the same relief would have been granted under the circumstances of this case if no such agreement had been made; and the respondents, *James E. Thompson*, *Charles C. Thompson*, and *David S. Keith*, relied and still rely on the circumstances of this case to entitle them to the relief granted; and they also relied and still rely on the said agreement, together with the other facts in the case; and in either case the said respondents are entitled to the relief as to all goods supplied after the 30th December, 1857.

Statement.

7th. The mortgage to the plaintiff did not operate to vest in him any property which was not the property of *Thomas Davidson;* the goods in question, whether fixed or not, never were the property of said *Thomas Davidson;* nor were the respondents wrong-doers in affixing or placing them upon the premises.

8th. Even if the said goods did become at law the property of the appellant, the respondents are in equity entitled to a re-delivery of them, unless the appellant elects to treat them as goods sold and delivered to him, which he has not done.

The administrators of *Davidson* also assigned reasons against the decree, in addition to those assigned by *McQuesten*—that they, being mere tenants-at-will of *McQuesten*, had no power or authority to deliver up the said fixtures; and that they were improperly ordered to pay costs before it was ascertained whether the property was put into the hotel before or after the 30th of December, 1857, (the date of *Davidson's* death,) and before the final result of the suit.

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Mr. *Proudfoot* and Mr. *Blake* for the appellant.

Mr. *McMichael* and Mr. *Fitzgerald* for the respondents, *Thompson & Co.*

Sir J. B. ROBINSON, Bart.—In *Jacques* v. *Worthington*, (*a*) which was referred to in the argument of this appeal, the case was, that *Thomas Davidson*, the proprietor of the City Hotel in Humilton, which was built and prepared for occupation at the time of his death, had been in negotiation with those plaintiffs for a large quantity of furniture, to be placed in the hotel; but he had not entered into a contract with them, or given any order for the work, before ill-health obliged him to leave Canada and go to Cuba, leaving *Stevenson*, his general agent, to manage his affairs for him in his absence, and "in particular to do what might be necessary in regard to the conduct and management of the City Hotel."

Judgment.

After he had gone, *Stevenson*, acting under his power-of-attorney, and in ignorance of *Davidson's* death, continued to negotiate with *Jacques & Hay* for the purchase of furniture; but before the delivery of the furniture, in January, 1858, there was no binding contract between them. In the meantime *Davidson* had died in Cuba; and the question was, whether the contract which *Stevenson* had made in January or February, 1858, when he gave a chattel mortgage, in the name of his principal *Davidson*, who had died on the 30th December before, was binding upon *Davidson's* estate. The Court of Chancery determined that it was not. The prayer of the bill was, that it should either be declared that the title to the furniture had not passed out of the plaintiffs, and that the defendants might be ordered to restore the same to them, or that the defendants (the administrators) might be ordered to

(*a*) 7 Grant, 192.

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execute a mortgage upon the furniture such in its terms as *Stevenson* had executed in the name of *Davidson*, but while *Davidson* was in fact not living.

The judgment in that case was, that although the court could not decree specific performance of a void contract, yet they must consider that the contract was void only in consequence of a mistake common to both parties; that the defendants, (the administrators of *Davidson*,) who had set up that defence, could have no right to retain the furniture, which had been delivered to them under a void contract; and that justice required that the plaintiffs should be placed as far as possible in *statu quo;* and they ordered the administrators, who had taken possession of the goods, to deliver them back to the plaintiffs, the vendors, and to pay their costs of the suit.

Judgment.

There can be no doubt that that decree was just, and that the only question in the case was, whether the aid of a court of equity was required or could properly be given. It was contended that the plaintiffs should be left to their remedy at law.

Here we have a question of a similar nature in some degree, but varying in its circumstances, growing out of the supply by these plaintiffs of labour and materials for fitting up the same hotel, and supplied in part before *Davidson's* death, upon a contract made with himself, and in part supplied after his death, upon a contract, as the plaintiffs contend, made by his agent *Stevenson* with the plaintiffs, after *Davidson* had died in Cuba, but before information of his death had reached Canada.

In this case also other considerations present themselves, from the circumstance that the goods supplied by these plaintiffs were put up by them in the hotel, and in such a manner that, it is contended, they are fixtures, and have become the property of the appellant

McQuesten, to whom *Davidson* had long before mortgaged the hotel for advances. This difference between the present case and that of *Jacques & Hay* against the administrators of *Davidson*, gives rise to several questions.

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The labour and materials supplied by these plaintiffs were applied in fitting up the new hotel with gas-lights, steam fittings, bells, and water closets. The work, it appears, was begun upon a contract made with *Davidson*, which the plaintiffs were engaged in executing at the time of his departure from Canada. Soon after he left Canada his insolvency became generally known; and the plaintiffs not being paid, as they should have been, according to the contract, for what they had done, suspended their work, and would not go on, till *Stevenson*, the agent, on the 6th January, 1858, agreed to give them, as he afterwards did, on the 28th of January, a chattel mortgage on the articles they were to supply, and to allow them to remove them from the building if they should not be paid according to the agreement which he had made with them in Davidson's name.

Judgment.

Davidson having died some time before in Cuba—viz., on the 30th December, 1857—though neither the plaintiffs nor *Stevenson* were aware of that fact till the 4th February following, the question is, what are the rights of the parties under these circumstances, first, as to the articles not affixed to the realty, (if there were any which should not be so regarded,) and next as to those which are fixtures?

We do not see the deed of the 28th January; but that cannot be material, since it is clearly void and of no effect, being executed in the name of *Davidson* by *Stevenson* as his attorney, under a power-of-attorney which had been revoked nearly a month before by the death of the principal. The written agreement or understanding, however, between *Stevenson* and these

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plaintiffs, which this chattel mortgage was intended to fulfil, was signed by *Stevenson* in his own name, and is as follows:

"Hamilton, 6th January, 1858.

"To *James E. Thompson*.

"Sir,—I undertake that for whatever work and materials you do and find for Mr. *Davidson's* new hotel after this date, I will give you a chattel mortgage on the materials for the value of the work and materials, and also assign to you sufficient rents, and also the chattels to be sold by auction, as collateral security to cover said work and materials."

(Signed,) "JAMES STEVENSON."

The mortgages which *Davidson* had given upon the hotel and premises to *McQuesten* are not shown to us. From what appears in the case, and was said on the argument, I assume them to be mortgages in fee, given some time before (in fact in 1855) to secure advances that had been made, and that should thereafter be made, to *Davidson*, for enabling him to erect and furnish the hotel. *Davidson's* interest in the hotel I assume was a freehold interest, but I do not find that stated.

Judgment.

First, then, as to any articles affixed or not affixed to the freehold, which were delivered in *Davidson's* lifetime, for which the plaintiffs have not been paid, they must of course take the chance of recovering from *Davidson's* estate. They had no lien on the goods, having delivered them, and not, as appears, upon any agreement with Davidson that they should have a right to reclaim them if not paid for.

2ndly, as to any delivered after *Davidson's* death occurred, and before it was known in Canada, I gather from the statements in the bill that the plaintiffs, on account of *Davidson's* failure to pay, and the apprehension of his insolvency, had ceased to do work or supply articles for the hotel before or just about the time (30th

December) that *Davidson* died in Cuba; but that, on and after the 6th of January, when the written undertaking was given by *Stevenson*, or perhaps a few days before, upon a verbal agreement to the same effect, the plaintiffs had resumed work and continued to supply materials. In doing this they must be looked upon, I think, as proceeding under the contract made with *Davidson* in his life-time, being content to do so upon receiving *Stevenson's* written guarantee, and thus waiving their right to rescind this contract, and stop in its execution on account of default in payment.

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Whatever materials they put in after *Davidson's* death, and up to the completion of their work, must, in my opinion, be considered as work done and materials found under the contract made with *Davidson* himself, just as if no such interruption of the work had occurred. It was, as we may suppose, work necessary to be done for carrying the contract to a completion, and entitling them to be paid for it, and necessary for rendering that portion of their work of value which they had executed in *Davidson's* life-time, and on account of which they had received payments.

Judgment.

The contract of the plaintiffs with *Davidson* is stated in the bill to have been verbal only, but particular in its terms:

"That is, to furnish, put up and supply the hotel in the manner required by *Davidson*, with all the materials and articles which could be furnished by the plaintiffs in the way of their trade, which consisted of plumbing, bell-hanging, gas and steam fitting, to be paid for as the work should progress, and as the goods to be furnished should be delivered at the hotel."

No objection is taken that this contract was not binding upon *Davidson*, under the Statute of Frauds, nor could have been taken, I apprehend, with success. The administrators have in their answers admitted it, and on

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the side of the plaintiffs it has been fully carried out. It was binding also upon *Davidson's* administrators as well as upon himself.

The plaintiffs have doubtless their remedy against *Davidson's* estate by action against his administrators, just as they would have had for any amount of ordinary moveable furniture supplied by them partly before and partly after the death of *Davidson*, upon a contract made with him in his life-time, but which during the progress of it they had for a time hesitated to proceed in, but had resumed on receiving assurance from himself or his agent that their payment would be made secure; and so long as they did waive their objection and go on with the contract, it would make no difference, I think, as regards their claim upon *Davidson's* estate to be paid the whole of their demand, and to hold his administrators liable, that their security for payment had failed in consequence of *Davidson's* death having occurred before the new stipulation was entered into. I do not think that the plaintiffs could be told that what they did after they resumed work, about the end of December, or beginning of January, was upon a new contract with *Stevenson*, and that they could only look to him, and had no claim upon *Davidson's* executors. *Stevenson*, by his written engagement of the 6th of January, may have rendered himself personally liable to the plaintiffs, that is, I mean, may have incurred by the terms of that writing a personal liability, from which the death of his principal would not relieve him. But the plaintiffs have good reasons for not being content to be referred to their common law remedy against the personal representatives of *Davidson*, or against *Stevenson*, and for desiring the aid of a court of equity to obtain a remedy more likely to be productive. If they should not be found entitled to any such remedy as the decree appealed from gives them, or as they have asked for, their case will be a hard one, if there is a large sum due to them for the work and materials which they have supplied. *McQueeten*,

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in his answer, expresses his belief that there is in fact little or nothing due to them; and it is an objection to the decree, that it does not, as must have been intended, provide for ascertaining what debt, if any, is really due to the plaintiffs for labour and materials, before they can obtain the restitution of the materials. Whatever may be the truth in this respect, and admitting even that there is such a large sum as $12,000 still due to the plaintiffs, as they assert, and that they have little certainty of being paid if they are confined to their legal remedy against the administrators of *Davidson*, or against *Stevenson*, still the case would not be harder than cases which are constantly happening, where a merchant sells goods upon credit, and before the credit is expired, or before they are paid for, they are seized by other creditors of the vendee, and sold to pay his debts to them; or where a man has built a house for another, who dies before it has been paid for, leaving an estate which turns out to be worth nothing.

Judgment.

At any rate we cannot strain the law in order to protect the plaintiffs from loss arising from the common cause of the insolvency of the persons with whom they had contracted.

There are well-founded objections to what the plaintiffs have prayed for, and to what has been decreed in their favour.

The case of *Jacques & Hay* v. *Worthington* was free from any such difficulties as occur in this. It was found there that the articles had not been sold and delivered upon a contract with *Davidson*, but on a contract with *Stevenson*, supposed (it is true) to be made with him as the agent of *Davidson*; but not so, in fact; for his principal was dead, and could no longer be represented as a contracting party.

It was assumed, therefore, that his estate could not be

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made liable. Whether *Stevenson* could not have retained the goods, if he had chosen to pay for them, was not made a question; nor whether he could have been made personally liable under the circumstances, which I think he could be. If the goods had been of a perishable nature, and had perished in the meantime, so that they could not be restored, the case of the vendors would have been hard indeed, if neither the estate of the principal nor the agent could have been made to pay. But no such questions were made; and as the estate was held not to be liable, and to have no interest in the goods sold, and as *Stevenson* did not take them, nothing could be more just than that the vendors should, at least, get the goods back, for which no one was held liable to pay.

Judgment.

But in the case now before us, there was a contract made with *Davidson* that extended to and covered all that has been furnished, and though the executing of that contract was suspended for a few days by the plaintiffs, and though it appears that *Davidson* had been in default upon it, so that the plaintiffs might have declined finally to go on with it; yet on being made secure, as they thought, they did, in a short time, go on with it and upon such an agreement as shews that they were executing the work not for *Stevenson* but for *Davidson*, as they supposed, that is, upon their *contract with him*, which they might do notwithstanding his death. The writing of 5th January, 1858, shews that *Stevenson* only intended to make the plaintiffs secure by undertaking to give them, on behalf of *Davidson*, a chattel mortgage on the things *as collateral security*—collateral with what? with the contract between them and *Davidson*, on which they had hitherto proceeded—so far as the being able to give this collateral security depended upon *Davidson* continuing in life, who was then in a distant country—the plaintiffs must be taken to have trusted to that. The proposed collateral security was, at all events, security in addition to what they had before; and,

according to the statements in the bill, nearly $8,000 was due to them for what they had done and supplied in *Davidson*'s life-time.

Then comes the question, when the plaintiffs, trusting to their agreement with *Stevenson*, went on and completed their contract and their work, did or did not the materials which they put in become the property of the estate of *Davidson*, in the same manner as the materials which they had put in in his life-time become his as soon as they had set them up in the building, or had delivered them? I think they did.

The plaintiffs endeavour to treat the work done after the end of December as done upon a new contract, and and in no manner in execution of the former; but I do not look upon it in that light. If *Davidson* had been in default in his payments, as is alleged, that put it in the power of the plaintiffs to rescind the contract, and stop where they were; but they did determine not to do so, and they went on, as I consider, under the contract, having received the collateral security that satisfied them.

Judgment.

It seems to me that the property in all the materials put into the hotel, by the way of fitting it for the reception of gas or water, putting up bells, heating furnaces, or other work of that kind, became the property of the estate, as being furnished upon a contract with *Davidson*, which did not cease with his life, but on which his personal representatives are liable, and these plaintiffs liable to them, on the principles which govern all such contracts. And I do not think that the property can be divested by any order of a court, and such things or parts of things as were delivered and put up after the death of *Davidson*, separated from those which had been in part or wholly put up before. Such a separation in regard to work of this kind might be destructive of the value of that which remained, as well as of that taken

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away, or, at least, very injurious to it; and though this would be no reason for denying the equitable relief, if the plaintiffs were right in what they had contracted for, yet it furnishes a strong reason against going contrary to strict legal principles, in order to protect them against a loss that all persons in business of that nature are subject to.

If the materials furnished since the death of *Davidson* belong to his estate, as, for the reasons I have stated, I think they do, save only as to the claim of *McQuesten* and others, in respect to their being fixtures, the plaintiffs' bill should be dismissed; and it is incumbent to consider the case in reference to *McQuesten's* interest.

Judgment.

I will only, therefore, say as to that part of the case, that at present I consider that *McQuesten*, as mortgagee of the hotel, now in his possession, is as much entitled to insist on being protected in the enjoyment of whatever has been affixed to the hotel, so as to form part of the realty, as he would be if he held the absolute estate, which in law, at this moment indeed, he does; and that he would be so entitled in respect of fixtures put in since he took the mortgage, as well as in regard to any that were in at the time. And I apprehend that right of his would be found to interfere with the relief intended to be given by the decree to a greater extent perhaps than was contemplated by the learned judge who disposed of the case; for in a question concerning fixtures in a case of this kind, not involving the condition of trade fixtures as between landlord and tenant, and relating to fixtures of such a description as those under consideration, I question whether we should find ourselves warranted by the doctrines which are now maintained—in treating all articles as chattels that have not been actually affixed to the freehold—or, that having been affixed to the freehold, can be removed therefrom without injury to the inheritance. We should be bound I think to consider that many things that are in common use, as parts of some

machinery or contrivance that is affixed to the freehold, and without which it would be incomplete, may and must be held to partake of the legal character of the machine or contrivance as a fixture, and this also in some cases where they are not in actual and constant contact one with the other; and still more, that parts of the machinery or contrivance which are really fixtures, from being actually affixed to the freehold, are not the less fixtures and property of the owner of the estate, merely because they can be removed without injury to the inheritance—that is, I mean without breaking or destroying the building. I am now again speaking of the law of fixtures as between vender and vendee, mortgagor and mortgagee, heir and executor, and not of trade fixtures as between landlord and tenant.

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The chattel mortgage given by *Stevenson* after the death of his principal *Davidson*, cannot affect the case, as it was simply void, and it can be of no consequence as far as regards *McQuesten's* interest, on these grounds, to contend that that deed and the agreement made on the 6th of January, between *Stevenson* and the plaintiffs, was only void because the parties acted under a mistake in supposing *Davidson* to be alive when he was not, because, if he had been alive at this time, and had even been present in Hamilton, and made such an agreement himself with the plaintiffs, nothing done between him and the plaintiffs could destroy or impair *McQuesten's* right as mortgagee, so long as he was not an assenting party; and I agree in the conclusion come to by the Vice-Chancellor, that the evidence shews that he was not assenting, but gave fair notice that he would insist upon his legal rights as mortgagee, and that they must act at their peril in removing any fixtures from the hotel. And this was no unreasonable line of conduct to take, if Mr. *McQuesten* advanced his money, as it appears he did, for the purpose of enabling *Davidson* to put up and complete a large and valuable hotel upon

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the land mortgaged, for he would naturally rely upon all that was to be done towards erecting and finishing the building and rendering it habitable and convenient was enhancing the value of his security.

The plaintiffs' bill should, in my opinion, have been dismissed, but not with costs.

DRAPER, C. J.—Concurred in the opinion of his lordship, the president, except on the question of costs. [His lordship the Chief Justice thought the bill should be dismissed with costs.]

ESTEN, V. C.—It appears to me immaterial to consider many points that were raised in the case. It may be safely said that there was no confirmation or adoption of the agreement alleged in the bill, on the part either of the personal representatives of *Davidson* or *McQuesten*.

Judgment.

This point being settled, it seems immaterial whether the goods delivered after the 6th January, 1858, were delivered in pursuance of the original contract with *Davidson*, or of some contract supposed to have been made before his death with his agent, *Stevenson*, or of the contract of 6th January. That no property vested in the goods till delivery seems clear. In the two former cases the delivery should have been to the personal representatives of *Davidson*. But at that time he had no personal representatives. The delivery was to *Stevenson*, the agent of *Davidson*. There was, therefore, no delivery to *Davidson*, who was dead; no delivery to his personal representatives, as he had none; no delivery to *Stevenson* in his individual capacity; no delivery to *McQuesten*, with whom there was no contract, and who was not in possession at the time. The only doubt that could be suggested, as appears to me, would be whether what occurred would not operate as a delivery to the administrators when they were appointed by a sort of relation. But whatever conclusion might

be arrived at, if such delivery had been made with full knowledge of *Davidson's* death, it seems unjust to apply such a principle when the plaintiffs were totally ignorant of that fact when the delivery occurred. They might have acted very differently had the fact been know But at all events it seems very clear that the go delivered after the 6th January were delivered in pur ance of the agreement made on that day, although the plaintiffs may have laid themselves open to an action for not performing the original contract, or for not performing the contract supposed to have been made on the 24th December, or some other day before the 6th January. 1802. McQuesten v. Thompson.

The result seems to be that the plaintiffs' goods are in the house of *Davidson*, mortgaged to *McQuesten*, who is in possession, excepting that the fixtures have probably vested at law in *McQuesten*; and the question is, what are the rights of the parties under such circumstances—*McQuesten* having refused to permit the plaintiffs to remove their goods? As to the chattels I presume that no doubt can exist. If one person place his goods by mistake in the house of another, the latter must permit him to remove them at proper times, and cannot treat him as a trespasser for entering his house at such times for the purpose. The only question would seem to be, whether a sufficient remedy does not exist at law? The withholding the goods would be, I presume, a wrongful conversion, and an action of trover could be maintained, probably also an action upon an implied contract. But in the case of *Eyre* v. *Eyre* (*a*) relief seems to have been given in equity, although a sufficient remedy existed in law on the ground of mistake. The question is whether a different rule applies to the fixtures? I see no reason for treating the mortgagee and heir as standing in a different position. No doubt the mortgagee is entitled to all fixtures subsequently annexed to the estate, and so is the heir, Judgment.

(*a*) 2 Ves. 86.

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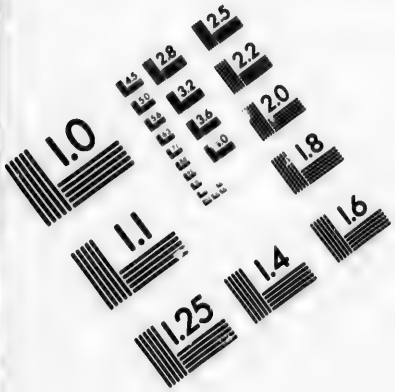

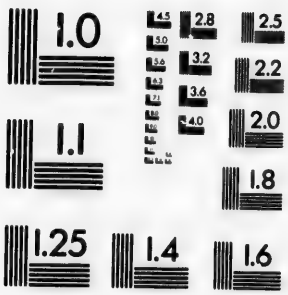

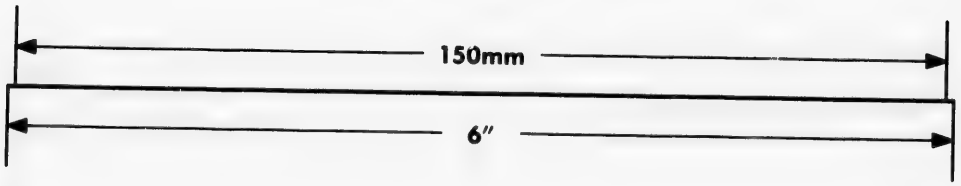

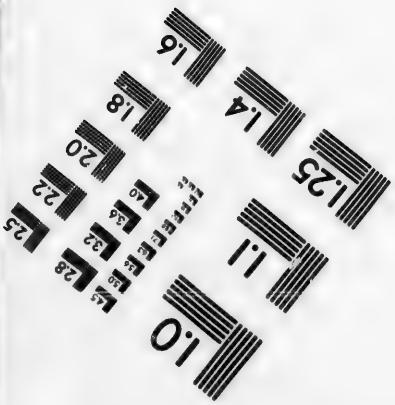

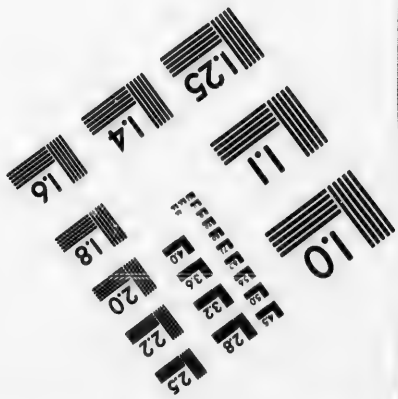

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and so is the owner of the estate, whoever he may be; but it is absurd to consider the mortgagee as a purchaser for valuable consideration of these fixtures not annexed, with any intention to augment his security, although doubtless the mortgage debt forms a sufficient consideration to support his title as a purchaser for value to every thing which properly belongs to the security. But if the goods are affixed by mistake, he must be treated like any other owner of property, to whose freehold goods have been affixed by mistake. Suppose A. to order goods to be affixed to the freehold of his house, and the tradesman by mistake to affix them to the house of B., supposing it to be A.'s house, it could make no difference in his rights and remedies that B.'s house was in mortgage and the legal estate vested in a mortgagee. The question is, what are his rights and remedies under such circumstances? In the present instance, no doubt, the plaintiffs delivered the goods under an agreement to

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have a chattel mortgage of them for their security. They relied more on this chattel mortgage probably than on *Davidson's* personal responsibility. This agreement would have been binding on *Davidson* and his real and personal representatives even as to the goods which became affixed to the freehold, if he had been alive when it was made. It was not binding on the mortgagees, who could have insisted on holding the goods affixed to the freehold until their claim should be satisfied.

The plaintiffs, however, stand in a very different position from what they would have held had *Davidson* been alive when the agreement was made. Supposing the mortgage satisfied, they appear to be without remedy unless the goods be specifically restored, or unless they would be entitled to proceed at law against the heir, in case of his refusal to permit the removal of the fixtures. They could maintain no action against the personal representavives of *Davidson*, or against *Stevenson*. If the goods were delivered in pursuance of the contract of of the 6th January, which was clearly the case, the mortgagee and heir are in *pari materia*, because the heir

is no more bound by the contract than the mortgagee, the contract being totally void as made with a dead person

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In short, it appears to me that the plaintiffs having, under a mistake of facts, placed their goods in a position in which but for that mistake they would not have been placed, are entitled to be relieved against the effect of the technical rule which vests the property of the affixed chattels in the legal owner of the freehold. With regard to the chattels which remain in that state, whether the contract was made in *Davidson's* life-time, or after his death, as there was no delivery the property did not pass, and the plaintiffs are entitled to relief. With regard to the chattels which have become part of the freehold, and of which the property has vested for that reason, I think they are entitled to be relieved against the effect of the technical rule; the mortgagee being placed in the same situation as if no mistake had occurred; that is to say, the property being placed in as good a position at the expense of the plaintiffs as if the goods had never been affixed; it being, as I think, clear that the contract under which the goods were delivered and affixed was made after *Davidson's* death, it was therefore void. I think that the decree is right in all essential respects and ought to be affirmed, and the appeal dismissed with costs. The plaintiffs have an equity to be relieved against the effect of the mistake, and this equity constitutes the legal owner of the inheritance, whether mortgagee or heir, a trustee for them. Of course they must be placed in the same position as if the accident had not happened, and if they cannot be the plaintiffs must bear the loss.

Judgment.

Per Curiam.—Appeal allowed and bill in court below dismissed with costs. [*Eston*, V. C., dissenting.]

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[*Before the Hon. Sir J. B. Robinson, Bart., President, the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. H. Draper, C.B., C. J. C. P., the Hon. Vice-Chancellor Esten, the Hon. Vice-Chancellor Spragge, the Hon. Mr. Justice Richards, the Hon. Mr. Justice Hagarty, and the Hon. Mr. Justice Morrison.*]

ON AN APPEAL FROM THE COURT OF CHANCERY.

GARDINER v. JUSON.

Ven. ex. issued on return to spent writ—Sale by sheriff set aside in equity at instance of an other judgment creditor—Registry of judgment—Certificate of deputy clerk of the Crown—Notice.

A *fi. fa.* lands having been lodged in the sheriff's office, was allowed to expire without any thing being done under it, either by seizing or offering for sale the lands of the debtor. Afterwards, a new sheriff being appointed, this with other process was handed over to him, and he proceeded formally to offer for sale the lands of the execution debtor, and made a return of "lands on hands for want of buyers;" whereupon the plaintiff sued out a *venditioni exponas* and *fi. fa.* residue, under which the lands which had been previously offered for sale were sold, and a conveyance thereof made by the sheriff.

Upon a bill filed by another judgment creditor, the court below set aside this sale, and ordered the deed to be cancelled; the *ven. ex.* and *fi. fa.* residue being, under the circumstances, absolutely void; which decree was affirmed on appeal.

A certificate of the entry of judgment, signed by the deputy-clerk of the Crown, held sufficient for the purposes of registering such judgment under the statute.

Courts of equity cannot, any more than courts of law, on the footing of want of notice of the illegality, give effect to proceedings which, on principles of the common law and under acts of parliament, are utterly void.

Statement.

The bill, in the court below, was filed by *Richard Juson*, *Edward Ferguson* and *Edward Hilton*, against *William Gardiner*, *Thomas Armstrong*, *Adam Hope*, and *William Glass*, (sheriff of the county of Middlesex,) setting forth, that in Trinity Term, 1857, the plaintiffs obtained judgment in the Queen's Bench against defendant *Gardiner* and his partner, (one *Edwards*,) for £262 18s. 9d., and registered it on the 14th October, 1857; that on the 11th January, 1858, the plaintiffs took out a *fi. fa.* against lands, and gave it to the then

sheriff of the county of Middlesex, (*James Hamilton*, Esq., since deceased,) by whom no step was taken towards the execution of such writ; that this writ was transferred, on the 13th January, 1859, to the defendant *Glass*, who had in the meantime succeeded Mr. *Hamilton* in the office of sheriff, and was renewed for one year from 5th July, 1859; and afterwards a new writ placed in the hands of sheriff *Glass* on 22nd August, 1860, was renewed for one year, from 17th May, 1861; that on 12th March, 1857, the present defendant *Hope*, with his partner *Harris*, (since deceased,) obtained judgment against the present defendant *Gardiner* alone, in the County Court of Middlesex, for £33 18s. 8d. and costs; (this judgment had not been registered;) that on the 15th April, 1857, (before *Juson's* judgment had been registered,) *Harris* and *Hope* took out a *fi. fa.* against lands, directed to the sheriff of Middlesex, and delivered it on that day to the then sheriff, (*Hamilton*,) which writ was not in any manner acted upon by sheriff *Hamilton*, and, being limited to be in force for twelve months, it expired while it lay in the office of sheriff *Hamilton*, and was not renewed; that on the 15th January, 1859, nine months after it had expired, it was handed over, with other unexecuted process, to sheriff *Glass*, by the gentleman who continued in charge of the sheriff's office, after Mr. *Hamilton's* death; that on the 12th September, 1859, the sheriff, *Glass*, at the request of the present defendant *Hope*, and of his attorney on record, returned, upon that *fi. fa.* against lands, that he had seized lands under it to the value of five dollars, which lands remained unsold for want of buyers, it being known at the time to sheriff *Glass*, and to the now defendant *Hope*, and to his attorney, that the writ had expired before it was transferred to sheriff *Glass*, and that nothing had been done under it while it was current; it was also in evidence that on the 21st September, 1859, *Hope*, by his attorney, took out a writ of *venditioni exponas*, directing the sale of the lands which, in the return to the expired *fi. fa.*, had

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been untruly stated to have been seized, with *fi. fa.* for residue, and placed such writ in the hands of sheriff *Glass;* that on the 22nd October, 1859, sheriff *Glass*, under the writ of *venditioni exponas* and *fi. fa.* for residue, exposed to sale all that part of the east half of lot 28, in the first range south of the Longwood road, in the township of Mosa, not included in a certain mortgage from the debtor *Gardiner* to one *Archibald Kerr*, containing twenty-five acres, which was bid off by the defendant *Hope*, the plaintiff in the writ, for £53; and the attorney for the plaintiffs in the writ gave a receipt to the sheriff in full of the judgment debt and costs, upon the sheriff executing a deed afterwards to the present defendant *Armstrong*, which was done at the request of *Hope*, who, since his purchase, had transferred his interest in the land to *Armstrong*.

Statement.

The bill averred that *Armstrong* accepted and held the deed with knowledge of the facts stated, and it charged collusion between sheriff *Glass*, *Hope*, and *Harris*, in making a false return to the *fi. fa.* against lands in the county court suit, in order to enable *Hope* and *Harris* to proceed by *venditioni exponas*, although the original *fi. fa.* had expired without any thing having been done upon it while it was current, and long before it had been transferred to the new sheriff, who acted upon it; which improper proceeding gave to *Harris* and *Hope* an apparent priority over *Juson & Co.*, depriving the latter of the benefit of their lien by registration of their judgment.

The defendants, *Hope* and *Armstrong*, by their answer, denied all fraudulent collusion, and notice or knowledge of any illegality of the proceeding to sell the land under *Hope* and *Harris'* writ.

Upon the cause coming on to be heard before Mr. Vice-Chancellor *Esten*, his honour delivered the following judgment:

"The plaintiffs obtained a judgment against the

defendant, *Gardiner*, and registered it in the county of Middlesex. They also duly procured a writ of *fi. fa.* against lands on the same judgment, and placed it in the sheriff's hands, and have duly continued it to the present time. The defendant, *Hope*, and his partner, *Harris*, had previously obtained a judgment against the defendant, *Gardiner*, and duly procured a writ of *fi. fa.* against lands on the judgment, and delivered it to the sheriff, to be executed before the registration of the plaintiffs' judgment, or the delivery of their writ. This writ expired without any thing whatever having been done under it. There was no advertisement, no seizure, no act whatever. It lay in the sheriff's office until some months after it became returnable, when, upon the death of the then sheriff, and the appointment of the present sheriff, the defendant, Mr. *Glass*, it was with other writs handed to him. He, more than a year after it became returnable, advertised the lands in question under it, and on the day appointed for the sale was proceeding to expose these lands for sale, when it appears that he, for the first time, discovered that the writ had expired. The defendant, *Hope*, who was present, wished him to proceed to a sale, but he refused, and being doubtful how he ought to act, Mr. *Wilson*, the plaintiffs' attorney, was consulted, and suggested to the sheriff that he might safely proceed to a sale; that if unauthorised it would hurt no one, but referred him to his own solicitor for advice. The sheriff upon this returned the writ, with a return to the effect that he had seized lands to the value of five dollars, which remained in his hands for want of buyers. Upon this a writ of *ven. ex.* and *fi. fa.* residue was issued, and delivered to the sheriff, under which the lands in question were sold to the defendant, *Hope*, who transferred his interest in them to the defendant, *Armstrong*, whose purchase is of a doubtful character. The plaintiffs have instituted the present suit, insisting that the sale to *Hope*, under the *ven ex.* and *fi. fa.* residue, was null and void; that no title passed to *Hope*, or from him to *Armstrong*, and that the lands

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in question are both subjected to the lien of their registered judgment, and liable to execution under their writ of *fi fa.* against lands now in the sheriff's hands; but that such remedies are hindered and obstructed by the sheriff's deed, held by *Armstrong*, of the same lands, made in pursuance of the sale under the writ of *ven. ex.* and *fi. fa.* residue. They insist that the original writ of *fi. fa.* issued upon the judgment of *Harris* and *Hope* having become spent without any thing having been done under it, any sale had by virtue of it would have been null and void, and that the writ of *ven. ex.* and *fi. fa.* residue being a mere offshoot from this writ of *fi. fa.*, and being incapable of existing by itself, was equally void with the writ out of which it grew, and that the sale effected under it was a nullity, and conferred no title. Supposing this construction to be well founded, I think it would follow as a necessary consequence that it should be the duty of the court to proceed to a sale of these lands for the satisfaction of the plaintiffs' judgment, and as a preliminary to that object to remove this void sheriff's deed—which, while it in fact confers no title, forms a cloud upon the plaintiffs' title, and an obstacle to a sale under their writ—out of the way. The question, I think, is, whether the writ of *ven. ex.* and *fi. fa.* residue was void or only irregular? If it was only irregular, the purchaser under it would acquire a good title, that could not be disputed; if it was void, the sale had under it would be equally void, and would confer no title. I have been unable to discover any case in which this precise point was decided. The nearest authority that I have been able to find is the case of *Doe dem. Greenshields* v. *Garrow*, (*a*) which establishes that if the sale had been under the spent *fi. fa.* it would have been null and void. I regret much that I have to decide this point of common law practice without assistance. After the best consideration that I have been able to give to the case, I think that the writ

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(*a*) 5 U. C. Q. B. 237.

of *ven. ex.* and *fi. fa.* residue must be deemed void, and the sale under it a nullity; and that it is the duty of this court to lend its aid to the plaintiffs to remove this obstacle out of the way of the plaintiffs, in order to enable them to obtain in an effectual manner the fruit of their judgment. The objections made to its registration are, I think, untenable. The defendants, *Hope* and *Armstrong*, cannot raise any effectual defence to the suit. *Hope* had clear, actual notice of the invalidity of the first writ. *Armstrong*, knowing that his purchase is of a doubtful and suspicious character, has paid only part of his purchase money, and cannot object, therefore, to the interference of the court. The sheriff is a party to the suit. A public officer acting erroneously in the discharge of his duty, cannot, I think, be joined as a party to a suit instituted for the purpose of setting aside his void act, in order that he may pay the costs of it without actual fraud and corruption, of which no proof exists in the present case. Mr. *Glass* acted erroneously, but in good faith, and under what he considered advice of a professional gentleman of high character. I think the bill must be dismissed as to him without costs. The plaintiffs are entitled to their costs, as against the other defendants, supposing the case to rest at this point. They held, however, a collateral security, and the defendants are entitled to an account of what has been done under it, in order to ascertain whether the plaintiffs' debt has been in whole or part satisfied. I see no reason to doubt that the plaintiffs could renounce the benefit of the mortgage, and appropriate it exclusively to the other creditors joined with them in the trust originally declared of it, even without the knowledge or consent of *Gardiner*, provided he would not be prejudiced by it; and *Hope* and *Armstrong* must in this respect stand in the same position as *Gardiner*. Costs, therefore, will be reserved. There is no ground for any enquiry as to waste at present."

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Whereupon a decree was drawn up, dismissing the bill as against the defendant *Glass*, without costs, and declaring that the sale of the land and premises in the pleadings mentioned by the defendant *Glass*, as sheriff of the county of Middlesex, to the defendant *Hope*, and the deed of the premises from the defendant *Glass*, as such sheriff, to the defendant *Armstrong*, were void, and that the deed should be delivered up to be cancelled; and ordered the same accordingly; and ordered the defendant *Armstrong* forthwith to deliver up the said deed to be cancelled; and declared that the plaintiffs were entitled to have the said lands and premises sold under the direction and decree of the court, and the proceeds thereof applied in or towards satisfaction of their debt and costs at law and in equity; and ordered a reference to the master at London to take an account of the amount due to the plaintiffs for principal and interest, and costs at law on their judgment in the pleadings mentioned; and on such account the master to charge the plaintiffs with what (if any thing) they had received from any collateral securities for their debt; reserving further directions and costs until after the master made his report.

Statement.

From this decree the defendants appealed, on the following grounds:

1. The sale under the appellants' writ of execution was under the circumstances valid.

2. The Court of Chancery was not a proper court for the giving of relief in the case. The proceedings in the court of law ought to have been corrected by application to that court, when an amendment might have been made.

3. The sale having been made by the sheriff, with the consent of the owner of the land, and at a time when no other execution was in the sheriff's hands, was effectual.

4. The respondents not having proceeded under their writ against lands, were in the same position as if they had not issued one for more than a year after the registration of their judgment, and therefore had no equity to maintain the suit. 1862. Gardiner v. Jones

5. The certificate of the respondents' judgment was informal and insufficient, and created no charge upon the premises in question.

6. The decree is erroneous in not declaring the appellants' judgment a charge upon the premises in its proper order of priority.

7. The decree is erroneous in ordering the deed to *Armstrong* to be delivered up to be cancelled.

In support of the decree the respondents assigned the following reasons: Statement.

1. The respondents say the sale under the appellants' writ was not valid.

2. The appellants' writ being void, could not be amended.

3. That the appellants could not by law be entitled legally to issue their writ unless the sheriff of the county of Middlesex had, before the issue thereof, in his hands a writ of *fieri facias de terres* in full force and effect, on which he made a return of "lands on hand for want of buyers," which was not the case herein.

4. That the action taken by the sheriff on the expired writ was void and illegal.

5. That the respondents could not move in a court of law from which the writ issued to set aside the same,

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because they were not parties to the judgment on which the same was sued out.

6. That the sheriff had in his hands a writ sued out on the respondents' judgment in force and effect before and at the time of the return of the expired writ, and at the time of the sale of land under appellants' writ.

7. That the respondents having registered and re-registered a certificate of their judgment in the county of Middlesex, as required by law, their lien by reason thereof attached on the said lands immediately on the expiration of the appellents' prior and expired writ, and then was and became a lien prior thereto.

8. That no sale by the sheriff afterwards could affect that lien or destroy it.

9. That no consent by the appellant *Gardiner* could affect or do away with the respondents' lien against the said land.

Statement.

10. That it was optional with the respondents to sell the said land under their writ of execution, by the hands of the sheriff, or to proceed in this court on the said certificate of judgment to sell or foreclose the same.

11. That the respondents have not by any act or neglect prejudiced their lien on the said land.

12. The respondents' certificate of the judgment, and registered as aforesaid, is regular and in due form, as required by law.

13. That there is no error in the decree.

On the appeal coming on to be argued Mr. *Roaf*, for the appellants, referred to *Moffatt* v. *March*, (*a*) *Morland* v. *Munro*, (*b*) *Commercial Bank* v. *Bank of Upper Canada*; (*c*) contending that the respondents, having

(*a*) 3 Gr. 623. (*b*) 12 U. C. C. P. 232.
(*c*) 21 U. C. Q. B. 91.

neglected for more than a year after the entry of their judgment to place a writ of *fi. fa.* lands in the hands of the sheriff, ' ıd lost their claim to priority. The proviso to the statute (9 Vic. cap. 34) shows plainly that the intention of the legislature was to regulate the priority amongst judgment creditors. He claimed priority for the appellants by virtue of the writ of *fi. fa.* residue which had been placed in the sheriff's hands, and which, for the purposes of this suit, might and ought to be treated as an alias. This writ may have been sued out irregularly, but was not void, and, not having been moved against, all proceedings taken under it will be held and taken to be valid.

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Mr. *Blake* and Mr. *Kerr* for the respondents.

The equitable charge created by the statute is not affected by the neglect of the creditors to place a *fi. fa.* in the sheriff's hands within a year from the entry of the judgment.

Argument.

The only person who could move against the writ in the action at law was the defendant. His assent, though binding on his own interests, cannot give effect to a void writ, so as to prejudice the rights of prior judgment creditors. The respondents, having sued out an alias writ, are entitled under it to set aside the deed which has been executed by the sheriff, and which, it is contended, is void, in order to obtain the fruits of their judgment.

The *fi. fa.* residue did not authorise the sale of these lands, but other lands. The *ven. ex.* was the writ under which the lands in question were sold. The two writs, though issued in one process, must refer to different lands. The sale was not and could not be under the *fi. fa.* residue, but under the *ven. ex.*, and this the appellants are compelled to admit was void. The *fi. fa.* residue was equally void, being founded on a spent writ;

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and supposing a seizure under it, an alias, it was contended, was the proper writ; but this would not have given the priority desired. It was, in fact, a fraudulent attempt to obtain priority.

Hughes v. *Rees*, (*a*) *McDonell* v. *McDonell*, (*b*) *Tiffany* v. *Miller*, (*c*) *Ross* v. *Harvey*, (*d*) *Giles* v. *Grover*, (*e*) *O'Brien* v. *Scott*, (*f*) *Abbott* v. *Stratten*. (*g*)

Sir J. B. ROBINSON, Bart., President (after fully stating the facts to the effect above set forth.)—The defendant, *Gardiner*, the judgment debtor, was seised of the land in question at the time of the entry and registration of the judgment of *Juson & Co.* against him and *Edwards*.

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The answer contains a statement that certain property of *Gardiner* had, before the entry of either of these judgments, been assigned in trust for the payment, amongst others, of *Juson & Co.'s* debt; out of which property the debt of Messrs. *Juson & Co.* either had been satisfied, as defendant alleges, or might have been, if the property so assigned had not been sacrificed and squandered, with the knowledge and acquiescence of the plaintiffs. The evidence, however failed to support any such defence.

The first question that has been made in the case is, whether the judgment of the plaintiffs was duly registered. The sufficiency of the certificate has been denied; but, though it was not drawn up with the care it should have been, it does, I think, comply with the statute.

The first statute providing for the registry of judgments (9 Vic., cap. 34, sec. 13) makes no particular mention of judgments to be entered in the superior courts before

(*a*) 4 M. & W. 468.
(*b*) 9 U. C. Q. B. 259.
(*c*) 10 U. C. Q. B. 65.
(*d*) 3 Gr. 649.
(*e*) 1 Clk. & F. 72.
(*f*) 11 Ir. Eq. 68.
(*g*) 3 Jones &. L. 603.

deputy clerks of the Crown in the country, though judgments had been allowed to be so entered by an act passed two years before (8 Vic. cap. 36.)

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The legislature could hardly have meant to exclude such judgments from the benefit to be conferred by registration; yet the forms of certificates given in the act purports to bear the signature of the "clerk" of the court only, nothing being said of a deputy clerk; and the enacting clause requires the certificate to be under the signature of the clerk, and under the seal of the court; and as the clerk of the court and seal of the court are to be found only in the principal office in Toronto, the case of judgments entered in the country would at first sight seem not to be provided for in that act; but we must consider that at that time all judgments so entered were required to be sent to the principal office without delay; and afterwards, by 16 Victoria, chapter 175, section 5, it was made incumbent upon the clerk of each of the superior courts in Toronto to furnish his several deputies with blank certificates of the entry of judgments under their respective hands, and the seals of the said courts respectively; and at last, by the Common Law Procedure Act, of 1856, (section 15,) authority was given to the deputy clerk in each county, after he had entered up a judgment in his county, to give a certificate signed by himself of such judgments, in the same form as certificates of judgments given by the clerks of the Crown and Pleas. As nothing is said about a seal, and as the deputies have not the seal of the court in their custody, it must be supposed that the signature of the deputy clerk was all that the legislature intended to require, though when a certificate is signed by the principal clerk, I see nothing to dispense with the necessity of a seal. The seal, therefore, being necessary in the one case, and not in the other, it is suggested that where there is no seal to the certificate, there should be something on the face of the document to shew that the seal of the court was not required to be

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affixed to it. That is not the case here, for there is nothing to show where the certificate was signed, and there is room for arguing that it may have been given in Toronto by the clerk of the court. Moreover, the deputy clerk who signs it does not state by any addition to his signature that he is deputy clerk for the county of Middlesex, or for any other county, and he declares, in his attestation at the end, "I have hereunto set my hand, and affixed the seal of the court;" from which we should be led to look for a seal, and not for any cause why it had not been affixed. Mr. *Askin*, however, does sign as deputy clerk. There is, in fact, no seal attached, and therefore, as no county is specified as that in which the judgment was entered, or the certificate given, it is to be considered that the statute does not require either to be stated. It cannot, therefore, be held that there is in this respect a want of compliance with the statute; and where nothing appears to the contrary, we should intend that all was regularly done, and that Mr. *Askin* was the deputy whose proper duty it was to give the certificate. It is not stated in the body of the certificate in what plea the action was in which judgment was entered, though the form given by the statute requires it; but as the necessity of mentioning any form of action in the summons has been dispensed with by statute, it would be unreasonable to hold that any particular form of action must be stated in the certificate. On the whole, though the certificate shows a want of proper care in drawing it up, I do not think we can hold it to be insufficient. Then the plaintiffs' judgment being registered as it was on the 14th October, 1857, it was re-registered on the 23rd August., 1860, which was within three years, and so the requirements in that respect of statute 20 Victoria, chapter 58, section 19, were complied with. And if, after the passing of the statute 13 & 14 Victoria, chapter 63, the same necessity existed as before under the first statute 9 Victoria, chapter 34, section 13, which in the Consolidated Statutes U. C., chapter 89, is assumed—that the plaintiff, whose judg-

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ment has been registered, shall, within a year from the entry of the judgment, put an execution against lands in the hands of the proper sheriff—that is shown to have been done in this case. So that the plaintiffs appear to have done all that rested with them for making their judgment binding upon the lands of *Gardiner*, and for preserving the charge or lien.

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Now, by the statute 13 & 14 Victoria, chapter 63, (passed 1851,) which was the law in force governing these matters at the time they took place, it was enacted, (sec. 2,) "that any judgment thereafter duly certified and registered, as in the said act provided, shall affect and bind the lands, tenements and hereditaments therein specified, in like manner as a judgment of any of her Majesty's superior courts at Westminster, when duly docketed, would have bound lands before the practice of docketing judgments had been discontinued in England." And further, "that a judgment to be entered up against any person in any court of record in Upper Canada, after the 1st day of January, 1851, (as this judgment was,) shall operate as a charge, as soon as a certificate of such judgment shall have been duly registered, upon all lands, tenements and hereditaments situate within the county where such certificate shall have been registered as aforesaid, or of which such person shall, at the time of registering such judgment, or at any time afterwards, be seized, possessed or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, * * * and shall be binding against the person against whom judgment shall be so entered up and registered, and against all persons claiming under him, after such judgment and registry; * * * and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act or any part thereof, as he would be entitled to in case the person against whom such judgments shall have been so

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entered up and registered had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest; and all such judgments shall be deemed and taken to be valid and effectual according to the priority of registering such certificates; provided, nevertheless, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice." The 4th section of the same act is also to be considered here, which provides, "that every judgment recovered after the date last aforesaid, (that is, after the 1st January, 1851,) a certificate whereof shall be duly registered, shall be deemed and taken as good and effectual, both at law and in equity, according to the priority of the time of registering such certificate;" and the 8th section, which enacts, "that the registry of any judgment under the first recited act, or this act, affecting any lands or tenements, shall in equity constitute notice of such judgment to all persons claiming any interest in such lands and tenements, subject to such registry."

Judgment.

I am not aware of any provision in the Consolidated Statutes of Upper Canada—I refer particularly to the Registration Act, chapter 89—nor in any other statute, which can affect the question between these parties, or that it can be of consequence to refer to, except the 18th Victoria, chapter 127, section 1, which enacts, "that no judgment of any court of record in Upper Canada shall create a lien or charge upon any lands, tenements or hereditaments within the same, or upon any interest in lands that are now or may at any time hereafter be liable to seizure or sale on any execution against lands, until such judgment shall be registered in the manner now required by law for registering judgments in the registry office of the county or union of counties in which such lands are situated;" which can be no further of consequence than as it tends to show by the reference

made in it to the liability of lands or any interest in them to be seized and sold on execution upon judgments; but the object, or an object at least of making a registered judgment a charge upon the lands, was to preserve for the judgment creditor a right to seize and sell it in execution, in virtue of the lien and charge, notwithstanding the attempt to intercept such remedy either through an unregistered judgment or any attempted alienation by the debtor. 1862. Gardiner v. Jukes.

We know that all provisions respecting the registration of judgments have by a late act (24 Vic., ch. 41) been swept away, but not without enactments to protect what had been done under them while they were in force, viz., that by the 11th section it is provided that nothing in that otherwise comprehensive repealing act contained "shall be taken, read or construed to affect any suit or action on or before the 18th May, 1861, pending in any court in Upper Canada, in which any judgment creditor is a party." This is a suit in which two judgment creditors are parties; and though I see no date to the filing of the bill, it must have been pending on the 18th May, 1861, for the answer is sworn on the 9th May, 1861. And by the 12th clause of the same statute, it is enacted that that statute shall take effect on the 1st September, 1851; and that in cases of judgments theretofore registered, as this was, all writs of execution against lands issued before the said 1st September, shall have priority according to the respective times of the registration of their judgments, on which they have issued or shall issue respectively. Judgment.

Turning to the facts of this case, the County Court judgment obtained by *Harris* and *Hope*, in November, 1857, was prior to the plaintiffs' judgment by six or seven months. But a judgment alone, without execution delivered to the sheriff, has been long ago held not to bind the lands of the debtor. It was so determined in

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Doe dem. McIntosh v. *McDonell*, (*a*) and in *Doe dem. Auldjo* v. *Hollister*, (*b*) and the law on this point has been so long understood to be well settled, that it would be a great hardship to disturb it, as it might affect many titles; and though there was some difference of opinion in the court in one of the cases cited, yet, according to the opinions expressed in the case I refer to (*Doe dem McIntosh* v. *McDonell*,) all appeared to consider that the judgment alone of an inferior court of record, without execution, did not bind lands. But in this case, the plaintiffs in the County Court judgment had put an execution against lands into the sheriff's hands before the plaintiffs, *Juson & Co.*, had even obtained their judgment: and if their execution had been acted upon before it expired, and there had been no acts in force respecting the registration of judgments, there could have been no room for doubt as to their right to be first satisfied. But as the facts stand, the case seems to me to be as clear the other way. We are to look at the questions raised, as we should have done if all the provisions respecting the registration of judgments had continued in force. The fact of *Harris* and *Hope* having placed a *fi. fa.* against lands in the sheriff's hands had only the effect at the utmost of giving him his first claim for satisfaction out of the lands by virtue of that writ, if it had been acted upon while it was in force. If any thing had been done under it which would have been an inception of execution, then the execution could have been perfected, and all would have been looked upon as done under the first writ. Whether in that case there would have been any good ground for contending that the plaintiffs, claiming under their registered judgment, were entitled to priority over the creditor pursuing his remedy under an execution begun to be acted upon while both the judgments were unregistered, it is not necessary to determine.

Judgment.

(*a*) 4 U. C. R. O. S. 195. (*b*) 5 U. C. R. O. S. 739.

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At present my impression is that under such circumstances the now plaintiffs would not, by virtue of the subsequent registration of their judgment, have been entitled to prevail. But when the writ of *Harris* and *Hope* against lands was allowed to lie in the first sheriff's hands, not in any manner acted upon till it was no longer current, and was not handed over to the new sheriff till it had entirely lost its force, then I take it that writ became unimportant for all purposes. It could not either restrain the judgment debtor from alienating his lands, or prevent the registration of *Juson's* judgment from having full effect as a charge, undiminished by any lien that might otherwise have accrued through *Harris* and *Hope's fi. fa.*

Assuming this to be so, then, what is there in the way of the remedy which the plaintiffs in this suit are seeking through a court of equity, which is one mode given by the statute (13 & 14 Vic., ch. 63) of making his lien productive? Nothing, unless the defendant *Hope* is right in contending that the step which he or his attorney took in September, 1859, in getting the spent *fi. fa.* returned in the manner it was, and proceeding to a sale under the *venditioni exponas* and *fi. fa.* for residue, could deprive these plaintiffs of the benefit of their lien. I think it could not, and that the judgment of the court below was quite correct on that point. (*a*)

Judgment.

It is quite clear that the only sale that was made was of the one property about which this contention is; and that property, and no other, was in contemplation of the plaintiff, *Hope*, and his attorney, and the sheriff, when they were considering whether the money could legally be made out of that property, by enforcing the execution that had been suffered to expire without any thing being done under it; and when it was thought fit to

(*a*) See Hughes v. Rees.

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abandon the idea of selling, under the expired writ, property that had never yet been seized, an attempt was ventured upon to make the sale colourably legal, by procuring a return to be made to that writ, which was really untrue, that lands had been seized under it. I do not think the court should lend its countenance to such a proceeding, by entertaining the surmise that possibly the return might have referred to some other lands, about which we see nothing in the evidence, and that the sale that was made took place, not under the *ven. ex.* which was grounded upon the false return, but was made in October, 1859, under the *fi. fa.* for residue, which was contained in the same writ, that had only issued just a month before. To suppose that, would be to suppose that the sheriff, on the 22nd October, seized and sold, under a writ against lands which came to him on the 21st September before, land respecting which he seems to have done nothing in the short interval by advertising or otherwise, and which he could not, with any regard to his duty, have sold as he did, if all the steps that he took were under that writ; and it is clear nothing had been done by him or his predecessor under the first writ. In my opinion, the sale made by the sheriff was not merely irregular, but was a void proceeding, a nullity, because it was wholly unauthorised. In common cases the sheriff, acting under an execution, whether by arresting the body, or by seizing and selling goods or lands, is held to be pursuing under the command of the court an authority derived from the plaintiff, and he is consequently held to be bound to observe the plaintiff's directions, and cannot rightly go forward when the plaintiff directs him to forbear; so much so that actions of trespass have been maintained against the sheriff by the defendant in the writ, for arresting or detaining the person, or for seizing on certain goods, where the plaintiff has instructed him to do otherwise. But the evidence of an agency or authority is only to be found in the writ itself; and here, can the authority

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be held to be continuing under a writ which, having expired, has lost its force?

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It is the express provision of an act of parliament, (C. L. P. sec. 249,) that every writ of execution, except those against the body, shall bear date on the day on which it issued, and shall remain in force for one year from the date, and no longer, if unexecuted, unless renewed. This writ was not renewed, and it was upon the face of it an uncurrent writ, unless execution had been begun to be made under it, which is not pretended; and moreover, *Hope*, the surviving plaintiff, being the party suing out the writ, was bound to see that all was regular. The proceeding was at his risk, and he it was who bought the property at the sheriff's sale, and not as agent for any other, but for himself. His selling afterwards to *Armstrong* was a distinct transaction. He cannot be heard to say that he acquired a title by an abuse of the process of the court, knowingly resorted to in his own case, or for his own benefit; and having acquired no title otherwise than by this void proceeding, he could transfer none to a purchaser. *Armstrong*, who bought to oblige the debtor, his brother-in-law, and at his request, and who has paid but a portion of the purchase money, can stand in no better position than *Hope* himself.

Judgment.

It has been objected that, admitting that the sheriff's sale cannot be sustained, yet the remedy to be sought by the plaintiffs, *Juson* & Co., does not lie in a court of equity, but that they should have sought relief in a court of law, by moving against the sale there; but *Juson* & Co. are not parties to the action in which the illegal proceeding took place, and could not therefore have moved on such ground. They might, I suppose, have insisted on following up their remedy by execution against the same land under their judgment, and by applying, if necessary, to the court to compel the sheriff to sell on their writ, notwithstanding his former

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invalid sale; but whatever course may have been open to *Juson* & Co. at law, it would not follow that equitable relief could not be extended on any of these general grounds which are the foundation of equitable jurisdiction. But besides, in this case the plaintiffs are pursuing a course which is given to them in express terms by the Registration Act, (13 & 14 Vic., ch. 63, sec. 2,) which gave to every judgment creditor registering his judgment "the same remedies in a court of equity against the hereditaments charged by virtue of that act (that is, by registration) as he would be entitled to in case the judgment debtor had power to charge, and, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest."

Judgment.

The jurisdiction in equity, in cases where a party has voluntarily placed a charge upon his lands by mortgage or otherwise, is at least as plain as where, in the words of this clause, he has agreed to charge it; and if a party standing in either situation can clearly go into equity, as he can, to obtain by a convenient proceeding the benefit of his incumbrance, he is by this clause equally entitled to the aid of equity to get the benefit of the incumbrance effected by the registration of his judgment.

It need hardly be remarked, that the defendants' case cannot be strengthened by the fact (if it were so) that the sale was made with the assent of the debtor *Gardiner* or by any thing determined in *Doe dem. Morley* v. *McManus*; for this is not a case of a party endeavouring to get rid of a proceeding taken with his own assent, or in consequence of his own representation; it is a contest between two judgment creditors, acting independently of each other, and each advancing a claim to satisfaction out of the same property, by reason of acts done to which the other was no party.

Much was said in the argument of the case, upon the

meaning and effect of the provision at the end of the 13th clause of 9 Victoria, chapter 34. It is a merely negative provision, by which we cannot hold any thing more to have been meant than is expressed in it; and that is, in effect, that under that act the party who shall have first registered his judgment shall gain nothing by priority in registration merely, if he does not put an execution against lands into the hands of the proper sheriff within a year after the entry of his judgment. 1862. Gardiner v. Juson.

We cannot hold, I think, that even after the passing of the subsequent act of 13 & 14 Victoria, chapter 33, that section can be taken as an indication of an intention that the judgment creditor who has registered must take his common law remedy by execution for obtaining satisfaction, if at all, by that course; and that such an intention, indicated in the statute of 9 Victoria, is to control and in fact render useless and insignificant the provision in 13 & 14 Victoria, chapter 63, section 2, which expressly gives to a judgment creditor, for enforcing his charge, created by registration of his judgment, the familiar remedy in favour of incumbrancers which the plaintiffs in this case are pursuing. If the two statutes are, in the points to which I am now referring, inconsistent, the former must give way to the latter; and it is enough at any rate to say that what the 9th Victoria, chapter 34, requires, was in this case done, for the plaintiffs did take out their *fi. fa.* against lands within the year and deliver it to the sheriff. And besides, the legislature, in 13 & 14 Victoria, chapter 63, after assuring to such judgment creditors as should register the same remedy in effect as mortgagees, have followed up that provision immediately with this other, "and all such judgments (that is, all judgments registered) shall be deemed and taken to be valid and effectual, according to the priority of registering such certificates;" which words cannot have full effect without excluding the contingency of registration being followed up by takeng out a *fi. fa.* on the judgment within a year. Judgment.

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As to the proviso at the end of the second clause of 13 & 14 Victoria, chapter 63, that nothing in that act shall be deemed to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice, that can only be held applicable to cases in which relief is applied for under various heads of equity, upon grounds on which such courts assume a peculiar jurisdiction, and in which, as a general rule, they decline to interfere actively for the relief of any party, where they cannot do so without inflicting an injury upon a *bona fide* purchaser for valuable consideration without notice of the alleged equity: but courts of equity cannot, more than courts of law, on the footing of want of notice of the illegality, give effect to proceedings which, on principles of the common law and under acts of parliament, are utterly void.

Judgment.

DRAPER, C. J.—I think the writ of *venditioni exponas* and *fi. fa.* for residue are wholly void; for they have no foundation to rest upon, except the spent writ of *fi. fa.* against lands, on which sheriff *Glass* was ill-advised to make a return, as it came to his hands after it was spent, and nothing then had been or afterwards could be done upon it.

Then as the judgment of *Hope* and *Harris* against *Gardiner* had never been registered, the plaintiffs' judgment, which I take to have been registered, became a lien or equitable charge on the execution debtor *Gardiner's* land; and the present suit, to have effect given to that charge, is entitled to succeed.

I am inclined to vary the decree so far as to permit *Armstrong*, the purchaser, to redeem the plaintiffs. *Gardiner* having assented to, if he did not procure, the sale by the sheriff, has no claim to consideration at *Armstrong's* expense.

ESTEN, V. C., remained of the opinion expressed by him in the court below. 1863.

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HAGARTY, J., concurred in the views expressed by the Chief Justice of the Common Pleas.

Per Cur.—Appeal dismissed with costs.

ON AN APPEAL FROM A JUDGMENT OF THE COURT OF COMMON PLEAS.

THE CORPORATION OF THE COUNTY OF SIMCOE v. STREET.

Unpatented lands—Wild land assessment—Payment of taxes to prevent land being sold.

Held, affirming the judgment of the court below, that unpatented lands, though held by purchasers from the Crown who had paid a part of the price therefor, were not liable to assessment, although purchased from the Crown after June, 1853. [ESTEN, V. C., *dubitante.*]

Held, also, that money paid to prevent lands being sold for taxes improperly rated upon them was not a voluntary payment, and could be recovered back under the common money counts.

Statement.

The suit in the court below was instituted by *Thomas C. Street* against the corporation of the county of Simcoe, to recover from them the sum of $499.46, paid by him under protest for taxes upon certain unpatented lands in that county, sold to *Street* after June, 1853. The amount was paid in two sums, $350 enclosed in a letter of the 29th of October, 1860, and the balance enclosed in a letter of 30th November of the same year, addressed to the treasurer of the county. These lands had been advertised for sale by the sheriff, and the treasurer handed the money received by him from *Street* to the sheriff in the early part of 1861. The declaration contained the common counts: money paid by plaintiff for defendants at their request; money had and received by defendants for plaintiff; and for interest; and on an account stated. The defendants pleaded never indebted; and payment and satisfaction. Upon these pleas the plaintiff joined issue. The cause was tried before the

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Hon. the Chief Justice of the Common Pleas, at the Niagara Assizes held in May, 1862, when a verdict was rendered for the plaintiff for the amount claimed, with leave to defendants to move to enter a verdict for them; the court to draw inferences of fact. At the trial several witnesses were examined; amongst them the Crown Land Agent for the county, who swore that the plaintiff had paid him an instalment of one-tenth of the purchase money for the lands in question, which were all unpatented until January, 1860, wild and uncultivated; two of the lots were patented to plaintiff in April, 1861. The late treasurer of the county was also examined; he proved the fact of the lands being in arrear and returned as absentee lands, and that on the 6th August, 1860, he had issued his warrant to the sheriff to sell these lands for taxes. The following letters, addressed by the plaintiff to that gentleman, were put in evidence at the trial:

Statement.

"Niagara Falls, Nov. 23, 1860.
"Chippawa.

"DEAR SIR,—Referring to my letter of 9th instant, in which I proposed to pay you a visit, and discuss the subject of your demand on me for taxes on the clergy reserves; I have now to say that as the sale is near at hand, and my time is so much occupied that I cannot well leave home for the purpose—that I will pay the balance which you claim if you will receive it under protest, and leave the matter open to be arranged at another time, rather than the lands shall go to sale. I have done this in other counties where I have lands of a similar description. Be pleased to answer by return of mail."

Niagara Falls, Nov. 30, 1860.
Chippawa.

"DEAR SIR,—I have been absent from home and just got back, and have merely time at present to enclose my check on the Bank of Upper Canada for $184 44c., the balance claimed by you on my clergy lands in your county, but which I pay, as before advised, and now accepted by you—under protest—as I claim that your demand to the extent sought, cannot be maintained

in law, and I will at another time endeavour to arrange the matter with you, or have a case submitted to the courts for their interpretation of the case. Please in answer state that I pay all these taxes, amounting to $534 44, under protest, and to save the land being sold for taxes."

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Also the letter of the 26th October, 1860, above referred to:—

"DEAR SIR,—The Public Lands Act of last session has reached the class of lands on which I heretofore objected to pay taxes, namely, the unpatented clergy reserves, sold after June, 1853."

"It is quite clear that before this act these lands were not liable, but I am in no position any longer to resist the claim of the county for the rates. I annex a list of those belonging to me, which you have advertised for sale, and I have to request that you will do me the favour to withdraw all of them from your schedule, and I will pay the taxes and charges that are legally due upon them, without the necessity of putting them up at public auction. Be pleased to signify your concurrence by early mail, and at your convenience send me the charges against each lot. In the meantime I remit my draft on the Bank of Upper Canada for $350 in advance, which be pleased to acknowledge and oblige," &c.

Statement.

The witness stated:—

"The first letter refers to lands taxed in the county of Simcoe. I have no doubt it refers to the taxes now disputed. So does the second more distinctly. I read my answer to this—agreeing to receive the money under protest—it is in reply to plaintiff's letter of the 23rd."

The witness further swore that, "The lands were advertised for sale for taxes at the date of this letter. I had not any personal communication with plaintiff; all was by letter. After receiving the two sums of $350 and of $184 44 from plaintiff, the lands were withdrawn from sale. I paid the money to the deputy sheriff."

The sheriff also was called as a witness, who swore,

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"I caused these lands to be advertised under the warrant proved by the last witness. I caused proper notices of sale, covering the lots mentioned, to be inserted in the Canada *Gazette* and local papers. I received from Mr. *Lally*, the last witness, the treasurer, through my deputy, the amounts claimed, including my fees, and paid the money for taxes over to the treasurer of the county, in the early part of 1861." It was also proved that the plaintiff had always resided at the Niagara Falls; that he occupied no lands in the county of Simcoe; that he had since paid the instalments which were due on these lands, and that only one instalment remained; that in 1861 plaintiff sent a person to inspect these lands, and that plaintiff, by advertising, offered some of these lands for sale; and that of the two lots patented plaintiff sold one in 1860, and one in 1861.

In Easter Term, 1862, the defendants moved for and obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside, and a verdict entered for the defendants pursuant to leave reserved at the trial on the ground that the plaintiff shewed no legal right to recover the amount claimed, and that taxes were properly payable on the lands of the plaintiff, being unpatented clergy lands, purchased by the plaintiff from the Crown after June, 1853; or to reduce the verdict by the sum of three hundred and fifty dollars, inasmuch as that sum was paid by the plaintiff voluntary, and not under compulsion, or under a mistake of fact.

Statement.

Upon argument, during the same term, the court discharged this rule, and from the judgment the defendants appealed, on the grounds,

1st. That the said judgment is erroneous and contrary to law, in that, the respondent's lands being lands purchased by him from the Crown, through the Crown Lands Department, were, though unpatented, liable to

taxation and his interest subject to sale under the assessment laws of this province. 1862.

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2nd. That the payment by the respondent was a voluntary payment; that the same was made to the treasurer of the county of Simcoe after he had given his warrant for the sale of the respondent's lands to the sheriff, and he was not the agent of the appellants to receive the money.

3rd. That the treasurer must in law be taken to have been the agent of the respondent in paying the money to the sheriff, and it was not proved, and it was erroneous to assume, that when he paid it over to the sheriff he gave the sheriff notice of the terms of the respondent's letter of protest.

4th. That the action cannot be sustained against the appellants, the sheriff not being their agent, but an independent officer discharging a duty cast upon him by law under the warrant of an officer independent of the appellants, and not controlable by them, and discharging distinct statutory duties. Statement.

5th. That as to the sum of $350 first paid, the same was voluntary; and if the treasurer had power to receive it for the appellants, it was in discharge of his duty, and he could not, without the concurrence and directions of the appellants, bind them by the letter of the 24th November, accepting the money as paid under protest.

Mr. *M. C. Cameron* for appellants.

Mr. *Eccles*, Q. C., for respondent, relied upon the reasons shewn in the judgment of the court below as sufficient to sustain the judgment appealed from.

The judgment of the court was delivered by

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VANKOUGHNET, C.—Two questions are presented in this case, the 1st, whether, under the facts stated, the lands of the plaintiff, in respect of which taxes were claimed by and paid to the defendants, were liable to assessment therefor.

The 2nd. Whether the sum of $350, paid by the plaintiff on account thereof, was not such a voluntary payment by him as deprives him of the right to recover it back. The residue of the amount of these imposed taxes is admitted to have been paid by him under compulsion.

We are of opinion that these lands were not liable to taxes. Had the question of liability rested alone on the 24th section of the statute, chapter 159 of 16 Victoria, we should have had some doubt, but the provisions of the act of the same year and session, commonly called the Assessment Act of Upper Canada, and chaptered 182, made plain what unpatented lands sold by the Crown are liable, if at all, to assessment. It was asked in argument, with what object or for what purpose was the Commissioner of Crown Lands required, under the 48th section of that act, to transmit annually to the treasurer of each county a list of the lands sold by the Crown, on which the instalments of purchase money were in arrears, unless with a view to their being taxed. The explanation of this is furnished by the 4th section of chapter 153 of 16 Victoria, which deprives of the right to vote, persons whose promised payments on Crown lands are in arrear. In this same session of 16 Victoria, (A.D., 1853,) were passed the three acts of parliament already referred to. The one relating to the public lands, the second to the qualification of voters at elections to the House of Assembly, and the third to the assessment of property for taxation in Upper Canada. They all were passed, that is, received the royal assent on the same day. It would be inconsistent with the Assessment Act, if the 24th section of the Public Lands Act was held

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to extend to Upper Canada, while the language of this section warranted it, the two acts in this respect are reconciled by confining the operation of the section referred to to Lower Canada. It is remarkable that there is no provision in the Assessment Laws of Upper Canada, at least I can find none, directly subjecting to taxation lands the title to which remains in the Crown. Chapter 58 of the Consolidated Statutes of Upper Canada, embodying the enactments relating to assessment, in its 9th section provides that all land shall be liable to taxation excepting land vested in her Majesty. Section 108 of this chapter requires the Commissioner of Crown Lands to transmit to the treasurer of the county, lands granted or leased, or under license of occupation, yet it does not, nor does any other section, say that such lands shall be subjected to assessment or taxation. Sections 125, 128, and 138, however, of the same chapter so evidently contemplate this liability and provide for the consequences of it, that I suppose it could not be successfully questioned. As to the second question I concur in the able judgment delivered by Mr. Justice *Richards* in the court below.

Judgment.

I am not disposed to limit the right of action for money had and received, where the money has by mistake gone into the wrong pocket. Here, it is true, there is no evidence that *Lally* (who must be treated as having acted for the plaintiff in the matter) made the payment of the money to the sheriff under protest, but he being treasurer of the county when he so paid it knew that the plaintiff disputed his liability therefor, and intended to contest it, for of this the plaintiff had given him express notice, and he also knew that he was merely going through a form in paying it to the sheriff, who would immediately pay it back to him as the officer of and for the county. It cannot be said under these circumstances that the money of the plaintiff passed into the exchequer of the defendants voluntarily, and with the intention to give it up to them on his part. I am myself inclined to

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coincide with the views, on this subject, of Mr. Baron *Martin*, as reported in *Steele* v. *Williams*. (*a*) It is not always easy to distinguish to the common apprehension between a mistake of law and fact. Suppose, for instance, in this case, a week or a day after the passing of the act referred to in the plaintiff's letter to *Lally* of the 26th October, he, the plaintiff, had been informed that this act subjected his lands to taxation, and acting upon this information, he, without seeing the act, which we will assume had not been published, paid the taxes, would this payment have been made in ignorance of law or of facts? If we proceed upon the fiction, that every man is bound to know the law, then it could not have been made in ignorance thereof, and yet would it not rather startle every man to learn that it was out of the power of a party to relieve himself from such a mistake. It seems to me that it would be more just and equitable to give relief there than where a party, with a full knowledge of the law and facts, submits to an unjust claim, and rather than incur the inconvenience of contesting it, pays it under protest, and thus secures or attempts to secure and reserve to himself a right of recovering it back, for this it seemed to be conceded in the argument he might do.

Judgment.

ESTEN, V. C., although expressing doubts as to the correctness of the judgment appealed from, concurred in dismissing the appeal with costs.

Per Curiam.—Appeal dismissed with costs. [ESTEN, V. C., *dubitante.*]

(*a*) 8 Ex. 625.

[*Before the Hon. Archibald McLean, C. J., the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. H. Draper, C. B., C. J. C. P., the Hon. V. C. Esten, Hon. V. C. Spragge, the Hon. Mr. Justice Hagarty,* the Hon. Mr. Justice Morrison.*] 1863.

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

SEXTON v. PAXTON.

Ejectment—Question of boundary—Costs.

Held, per Curiam.—Affirming the judgment of the court below, that in an action of ejectment the question of boundary may be tried to ascertain whether the land in question formed part of the lot claimed by the plaintiff. [DRAPER, C. J., and MORRISON, J., dissenting.]

Where the Court of Queen's Bench and Common Pleas had given opposing judgments on the same question, this court, on affirming one of those judgments, dismissed the appeal without costs.

From the pleadings and evidence it appeared that the appellant brought ejectment in the Court of Queen's Bench, to recover from the respondent seven acres, two roods, and twenty perches of land, being a portion of lot ten, in the twelfth concession of the township of Scugog, formerly Cartwright, and which piece of land may be better known as follows: commencing at a post planted by *W. E. Yarnold*, P. L. S., on the fifth day of June, one thousand eight hundred and sixty-one, at the north-west angle of said lot, then south sixteen degrees east thirty-five chains, more or less, to the centre of the concession, then north seventy degrees east two chains, twenty-five links, to a certain blazed line, thence along the said line north thirteen degrees west thirty-five chains, more or less, to the rear of the concession, then south seventy-four degrees west two chains six links, to the place of beginning. Statement.

The respondent appeared and defended for the whole of the said premises.

The appellant claimed title by deed from the executrix

* Was absent from the province when judgment was pronounced.

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and executors of the last will and testament of *John Tucker Williams*, the grantee of the Crown.

And the respondent, besides denying the appellant's title, claimed the said parcel of land as part of lot number nine, in the twelfth concession of said township.

The ownership of lots numbers ten and nine, by the appellant and respondent respectively, was admitted at the trial, when his Lordship, Mr. Justice *Richards*, before whom the trial was had, ruled that a verdict should be entered for the appellant, as he could only be entitled to recover, by his writ of possession, the land if it formed part of lot number ten, which was admitted to be his; and if it was part of lot number nine, the verdict and judgment to be entered thereon would not authorise him to take possession of it, and that an action of ejectment was not the proper form of action in which to try a question of boundary.

Statement.

This verdict the court in banc set aside, on the ground that the respondent ought to have been permitted to shew that the land claimed by the appellant was not part of lot number ten, as reported in the U. C. Q. B. Rep., vol. xxi., p. 389.

From this decision the plaintiff in the court below appealed, on the ground stated by the learned judge, for his ruling at *nisi prius*.

On the appeal coming on,

Mr. *M. C. Cameron*, for appellant, referred to *Lund* v. *Savage*, *Lund* v. *Nesbitt*, (*a*) and *Irwin* v. *Sager*, (*b*) as containing all the cases bearing on the question involved in this appeal.

Mr. *J. Hillyard Cameron*, Q. C., contra.

VANKOUGHNET, C.—I agree in the judgment delivered

(*a*) 12 C. P. U. C., 143. (*b*) 21 U. C. Q. B., 373.

in the Court of Queen's Bench upon the question submitted to us in this case. I think that the statute 19 Victoria, chapter 43, made no change in the office of the action of ejectment; indeed, section 274 of the act expressly preserves the same jurisdiction as was exercised in the old action of ejectment, and such change as is affected in the form of procedure is more favourable to the procuring, by the plaintiff, of the trial of a question of boundary, than was the old process; for what does the present writ of ejectment enable the plaintiff to do? While it requires him to describe the premises of which he seeks possession with reasonable certainty, it enables him to set them out with great particularity, just as was done in the present case, and to obtain a judgment, which shall declare that the claimant "was, and still is, entitled to the possession of the land within mentioned, as in the writ alleged;" so that if, as in the present case, the defendant was not permitted to shew that the portion of land to which plaintiff claims to be entitled, as being part of lot ten, which he owns, is really not part of lot ten, but part of lot nine, then all a plaintiff need do now, in any case in which he seeks to get into possession of another man's land, is to describe it by metes and bounds as being part of a lot to which he has an indisputable title, and either on production of that title, or because it is not denied, obtain a solemn judgment of the court, entitling him to possession of the particular premises which he describes in his writ, and under that judgment obtain possession of it, through the process of the court. Could an action of trespass be afterwards maintained against him or the officer who put him in possession, for the act of taking possession under such authority? (*a*) In the old action of ejectment, every thing was at large, unless the defendant chose to confine the dispute to certain described premises. The plaintiff had no object in narrowing them in his declaration, (though he might

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(*a*) *Wilkinson* v. *Kerby*, 15 C. B. 430

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have done so, and have thereby directly presented a question involving boundary,) and when the matter was left at large by the defendant, and the plaintiff showed title to any portion of the land covered by his declaration, he obtained a verdict, and took possession, at his peril, of more than his title covered. But here the plaintiff, by his writ challenges enquiry into his title two, and right to possession of, the piece of land particularly set out, by reason of his being owner of lot ten, and of this piece of land forming part of it—a double proposition, which, it seems to me, the defendant is invited to combat. Under the statute it is expressly provided that at the trial it shall be a question whether the "claimants are entitled to the whole or part, and if to part, then, to which part of the property in question?" and judgment is to be entered accordingly. How can this be done without trying the question of boundary? An action of ejectment is essentially a possessary action.

Judgment.

Whatever a plaintiff's title may be if he had not a right to the possession of the land at the time of action brought, he cannot recover. It is known as an action of trespass and ejectment. Indeed, the ouster, the act of trespass, was the very foundation of the old form of action; and whereas a simple action of trespass, which can be supported by precisely the same evidence of title, would only give damages—an action of trespass and ejectment would give damages (in modern times only nominal it is true) and possession also. The action of ejectment was, as we all know, a fictitious proceeding, invented for the relief of termors who had been ousted of their possession; and originally questions of freehold title were not raised in it, but were left to be dealt with in real actions. In time, however, while the form of claiming by virtue of a term continued to be preserved, titles of landlords to the fee came to be asserted in it. I have alluded to so much of the origin and early character of the action to show that it was not originally intended as a means whereby titles to freehold should be tried. And yet, as I understand, it is now contended that nothing

but a title can be tried in the action, and that you cannot in it enquire whether the title produced does, or does not, fit the particular piece of land in question. However rare may have been in England the instances in which a dispute as to boundary has been waged by means of this action, it is beyond doubt that such an use of it has been made in this country for a long period of years, and for this no higher authority can be desired than the judgment of that great and lamented judge, the late Chief Justice of the Queen's Bench, as reported in *Irwin* v. *Sager*. (a) I need do no more on this head than refer to that report. We must take the legislature to have known what was the law and practice of our courts, when they framed section 274 of the act already mentioned, and to have referred to our own courts, and the jurisdiction which had been exercised by them; and this, of itself, seems to me to settle the question. That ejectment is an inconvenient mode of trying such a question, and is, therefore, seldom for that purpose used in England, I admit, as it is not conclusive; but the same objection exists to trying a title in this form of action. A judgment in it is no more conclusive in the one case than in the other; and yet, there must be something tried in the action. Its principal object is to get possession of a particular parcel of land; and the plaintiff must either be compelled to adopt a less precise mode of description than he has done here—as, for instance, by claiming merely lot ten—to which claim no defence would have been made; or the defendant must in justice be allowed to shew, by any means he can, that the plaintiff is not entitled to the possession of the parcel described. To deny him this right would be to place him at the mercy of the plaintiff, and probably to allow the latter, by a fraud and untruth, upheld by the process of the court, to get his neighbour's property. It is not sufficient satisfaction to a defendant who has had his hands tied while this wrong is being committed

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(a) 21 Q. B. 373.

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on him, and he has, perhaps, been turned out of his dwelling house, to know that, in six months' time, he can get into it again by, first, an action of trespass, to settle a question of boundary, which the plaintiff has, perhaps, improperly raised for his own purposes; and then, by an action of ejectment—or, by the latter action alone—inasmuch as the action, at the suit of the plaintiff, is not conclusive on the right. I think the legislature, when they enacted "that the question at the trial shall be, whether the *statement* in the writ of the title of the claimant is true or false," meant something more than the mere enquiry into a title to lot ten, for instance, as in this case: they meant the enquiry to extend to the plaintiff's whole statement; and part of that statement here is a claim to a piece of land as being part of lot ten, and this, and only this, the defendant denies, and it is, therefore, the only question between the parties.

Judgment.

DRAPER, C. J.—I adhere to the judgment of the Court of Common Pleas in *Lund* v. *Savage* and *Lund* v. *Nesbitt*. The reasons for that judgment are fully expressed in the report of those cases. I need not here repeat them, for I have only to say that, in my humble opinion, they have, as yet, received no answer. There were but two substantial difficulties in that case: one arising from the enactment respecting improvements made by parties on land not their own, though believed to be so in consequence of unskilful surveys; the other arising from the practice which obtained in this province, under the old form of the action of ejectment.

The first was, as I think, successfully dealt with in the judgment referred to. The difficulty was more easy to be got over, in the opinion of the court, than that which the construction contended for under the Common Law Procedure Act gave rise to. The latter was not considered by any of the court of the importance which has been given to it.

So long as the action of ejectment was fictitious—

moulded and governed by rules of court—it was open to the power which created to modify its own work. In Upper Canada, however, the deviation from the ordinary consent rule, which was without precedent or authority in English cases, seems to have been introduced, without the sanction of the court in the first instance, though it was subsequently adopted and acted on. But I believe I am right in stating that there never was a general rule of court introducing or sanctioning the innovation by which, when a plaintiff declared in ejectment for (*ex. gr.*) No. 1, in the 1st con., the defendant in the consent rule could—not admitting possession as the general rule required—state that he was in possession of a specified piece of land which he claimed and defended for as part of No. 2. From the time this change was established, it became, practically, the rule to make the question of title entirely subservient and secondary to the question of boundary; and the practice so established had its advantages for surveyors and for attorneys, and for those suitors who did not count the cost of litigation, however often renewed. I repeat, however, that for this practice, neither reported cases of English courts, nor text books of English writers, afford either precedent or authority.

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And this practice was unchallenged until after the passing of our Common Law Procedure Act. Not that the objectionable results of it were undiscovered or unfelt, but from a deference to the authority which permitted it to grow up, and finally had recognised and sustained it.

With an exception, which I will presently notice, our Common Law Procedure Act of 1856, was, as to the ordinary action of ejectment, a transcript of the English statute. That an act of our legislature, identical or nearly so in language with the English act, should mean the same thing, and should receive the same construction, is, I humbly submit, a reasonable expectation, more especially when we draw upon English authority, as

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upon the fountain from which our jurisprudence is derived. If the effect of the plain language of the act is to alter the practice and proceeding which was previously in use, then, we are bound by the expression of legislative will, and no argument can be solidly based upon previous practice. The courts may sanction a departure from their own rules, or an addition to what such rules prescribe, but the courts have no power to add to or vary an act of parliament; nor to add to the simple appearance which the statute directs, qualifying or varying matter, tending to raise a different question from that which the statute directs, namely, whether the statement in the writ of the title of the claimant be true or false. It is admitted that if the claimant proves title to a single inch of that which *he claims* in his writ he must recover; that admission appears to me fatal to the contention that defendant can add any thing to his appearance except the notice that he defends for part only, which is to form part of the issue to be tried. But unless the defendant may convert a simple appearance into a *quasi* plea in confession and avoidance, the claimant, by this decision, will have this advantage; for he may always in his writ name the lot for which he brings ejectment, and to the name may add a description by metes and bounds. If the defendant only appears, the claimant, in order to entitle himself to a verdict, need only prove title to the lot as named, without giving any evidence of the description; and yet if the question of boundary is the sole matter in dispute, and if the verdict establishes the claimant's right to the land as described, he may succeed without proving any boundary whatever. On such an appearance as the statute warrants, the defendant cannot raise the question, that the description covers part of another lot than that named in the writ; and the statute does not authorise the defendant to do more than appear, and declares what the effect of that appearance shall be as to the matter put in issue, namely, title, but not a syllable about boundary. Up to this time I have not doubted that

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an appearance which contained additional matter was irregular, because, all the statute authorises is, that the defendant may appear as he may in any other action: it goes no further, and, impliedly at least, prohibits more. 1863. Sexton v. Paxton.

The exception I have above adverted to is the requirement that each party shall give to the other notice of the title on which he means to rely at the trial. I have not succeeded in extracting from this enactment any foundation for an opinion that our legislature intended to depart from the English act, and to sanction mere questions of boundary being tried under the name or colour of disputes of title. That a claimant may so frame his writ of ejectment as to mix, inseparably, the questions of title and boundary, I do not, and did not, in the judgment referred to, deny. But the defendant can always obtain an order for better particulars of the land claimed, and has some authority in one judgment, at least, of the Court of Queen's Bench, for asking that the number of the lot, or other name of it—when it has one derived from public authority—should be given; and if the plaintiff then claims a lot, or part of a lot, to which the defendant has no title, he is under no necessity to defend. He never need be embarrassed by a want of reasonable certainty in the description in the writ, for, if that exists, the statute provides him a remedy; and this affords an answer to any suggestion of unfair advantage that an unscrupulous plaintiff, with the aid of a tricky attorney, might try to obtain. Judgment.

I will only add that I have endeavoured, but in vain, to discover how the section which provides what the effect of a judgment in ejectment under our statute shall be, can influence a decision as to what it was intended by another section, should be the question raised at the trial.

If, after the most careful and repeated consideration, I felt any doubt as to the opinion I have formed, I

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would have let this case be disposed of without making an observation. The real doubt which the decision of this court tends to create in my mind, is my ability to arrive at a right conclusion; and hence must arise a distrust of my own judgment, embarrassing during the period, be it longer or shorter, during which I may continue in my present vocation. I may be excused from saying that if I stood alone in my opinion, this distrust would have been painfully increased. My opinion is, however, shared by three of the present Judges of the Courts of Common Law. I submit, as in duty bound, to the authority of this tribunal, but I have not been able to add conviction to submission.

Judgment.

ESTEN, V. C.—I think the judgment should be affirmed with costs. It appears that a practice had grown up in this country, of trying questions of boundary by means of an action of ejectment. I think the late act makes no difference in this respect. By the 21st section, I consider that the writ and notices annexed to it are incorporated for the purpose of affording a statement of the plaintiff's title; and the question to be determined at the trial is, whether that statement is or is not true. In the present instance, if we take the writ and the notices together, we shall see that the plaintiff shews a title, by his notice, only to lot ten, but not at all to the piece of land in dispute. By his writ, however, he shews a title to that as part of lot ten; and the title, as claimed, is composed of a right to lot ten, and a right to the piece of land in dispute as part of that lot; and the question to be determined at the trial was, whether that claim was or not true. The plaintiff, who did not simply claim lot ten, has, by the form of his claim, raised a question of boundary; and the defendant, only meeting him on his own ground, ought, I think, to have been allowed to prove his case.

SPRAGGE, V. C., concurred in the opinion delivered by V. C. ESTEN.

MORRISON, J., agreed with the views expressed by his Lordship the Chief Justice of Common Pleas. 1863. Sexton v. Paxton.

MCLEAN, C. J., suggested that as the courts below had come to different conclusions on the same question, it was a proper case in which to dismiss the appeal without costs, although on dismissing appeals the practice was almost uniform to give to the successful party his costs of the appeal.

Per Curiam.—Appeal dismissed without costs. [DRAPER, C. J., and MORRISON, J., dissenting.]

RICHARDS, J., who was present when judgment was delivered, remarked that having been absent on the argument of the appeal, he could not give any judgment; at the same time stating that subsequent consideration of the point had failed to change his views, and that he adhered to the opinion delivered by him in the cases referred to by his Lordship the Chief Justice of Common Pleas. Judgment.

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[*Before the Hon. Archibald McLean, C. J., the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. H. Draper, C. B., C. J. C. P., the Hon V. C. Esten, Hon. V. C. Spragge, the Hon. Mr. Justice Hagarty,* the Hon. Mr. Justice Morrison, and the Hon. Mr. Justice Connor.†*]

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

HOLCOMB v. HAMILTON.

Bill of exchange—Joint action—Discharge of one of several defendants.

Held, (affirming the judgment of the court below,) that where the holder of a bill of exchange or promissory note sues, under the statute, the drawers, acceptors and endorsers, in one action, he may discharge the drawers or endorsers [or accommodation acceptors] after an arrest under a *capias ad satisfaciendum*, without losing his remedies against the other defendants liable in priority to those discharged.

[MCLEAN and DRAPER, C. JJ., dissenting.]

Statement.

This was an appeal by the defendants from a judgment of the court below, in an action wherein *Robert Jarvis Hamilton* and *Milton Davis* were plaintiffs, and *Samuel T. Holcomb* was defendant. The facts of the case are sufficiently stated in the judgment of his Lordship the Chief Justice in disposing of this appeal, and in the report of the judgment in the court below, in the 12th volume of the Common Pleas Reports, page 38.

From the judgment there reported, the present appeal was brought, on the grounds, that the judgment given by the court below on the demurrer by the defendant to the second replication to the third plea of the defendant is erroneous and should be reversed, because the action being upon a joint judgment against the defendant and *John Macpherson* and *Samuel Crane*, it is not competent to the plaintiffs in another action to set up in reply to the defendant's plea the position in which the said *John Macpherson*, *Samuel Crane* and the

* Was absent from the Province when judgment was pronounced.
† Died before judgment was pronounced.

defendant stood in regard to each other on the instrument upon which the judgment now sued upon was recovered; and also, that it is immaterial whether the plaintiffs have received any money or other property on account of the said judgment: the arrest of the said *Macpherson*, and his discharge by the consent of the plaintiffs, operating in law as a discharge of all further remedies on the said judgment.

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Mr. Galt, Q. C., and *Mr. Anderson*, for the appellant.

Mr. R. A. Harrison for the respondents.

The cases principally relied on appear in the judgments of their lordships, and in the report of the case in the court below.

McLean, C. J.—This was an action on a judgment recovered on the 12th day of January, 1858, in the Court of Common Pleas, against the defendant and one *John Macpherson* and *Samuel Crane*, for £505 11s. 8d., together with £19 7s. 6d., costs of suit, amounting together to £525 19s. 2d.; which said judgment, the plaintiffs allege, remains in full force, unreversed and unsatisfied; and the plaintiffs have not obtained any execution or satisfaction for or upon the said judgment; whereby an action hath accrued to the plaintiffs, to demand and have of and from the defendant the said sum of £525 19s. 2d.; yet the defendant hath not paid the same, or any part thereof, and the plaintiffs claim £800.

Judgment.

The third plea, which is demurred to, is as follows: "And for a third plea, the defendant says that before action brought, the judgment sued upon in this cause was satisfied in this, that the plaintiffs, after the recovery of the judgment in the declaration mentioned, on or about the first day of July, 1858, caused a writ of *capais ad satisfaciendum* to be issued out of this honourable court, directed to the sheriff of the United

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Counties of Frontenac, Lennox and Addington, whereby the said sheriff was commanded to take the body of the said *John Macpherson* in satisfaction of the said judgment; under and by virtue of which writ the said *John Macpherson*, one of the defendants in the judgment declared upon in this cause, was arrested and taken, and detained in close custody of the sheriff of the aforesaid United Counties of Frontenac, Lennox & Addington, in satisfaction of the said judgment, and was so detained in close custody of the said sheriff, or on the limits of the said United Counties, until he was, by the order and authority of the plaintiffs, discharged from custody of the said United Counties, whereby the said judgment was satisfied."

Demurrer to the third plea, on the following grounds: that the mere arrest and subsequent discharge of one defendant on a writ of *capias ad satisfaciendum*, is not such a satisfaction and extinction of the judgment as to discharge another defendant from all liability thereon; that it is not shown that by the arrest and discharge of the said *John Macpherson* the now defendant lost any remedy over against him or any other party to the judgment; and that it does not appear that the said judgment was paid or satisfied as against the now defendant.

Judgment.

The plaintiffs take issue on the pleas of the defendant: "And for a second replication to the third plea, the plaintiffs say that the judgment in the declaration mentioned was recovered by the plaintiffs on a bill of exchange drawn by the now defendant upon and accepted by the said *John Macpherson* and *Samuel Crane* for the accommodation of the now defendant, and not otherwise; and that the said *John Macpherson* and *Samuel Crane* did not, nor did either of them, ever receive any value or consideration whatever, and were in fact only sureties for the now defendant; and that the said debt, for which the said judgment was recovered, was and still is the debt of the now defendant. And the plaintiffs further say, that after the arrest of the said *John Macpherson*, under a writ of *capias ad satisfaciendum*, as in the said third plea mentioned, he applied for and obtained the benefit of the limits of the

gaol of the said united counties of Frontenac, Lennox and Addington; and that while he was on the limits of the gaol of the said united counties thereunder, the plaintiffs consented to the discharge of the said *John Macpherson* from such limits, which is the discharge from custody referred to in the said plea; and the plaintiffs further say they did not, nor did either of them, ever receive any money or other property; and that the same is not in any manner, either in whole or in part, paid, satisfied or discharged, as against the now defendant."

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Demurrer to this replication, on the grounds: "that the action being upon a joint judgment against the defendant and *John Macpherson* and *Samuel Crane*, it is not competent to the plaintiffs in this action to set up in reply to the defendant's plea the position in which the said *John Macpherson* and *Samuel Crane* and the defendant stood with regard to each other, on the instrument upon which the judgment now sued upon was recovered; and that it is immaterial whether the plaintiffs have ever received any money or other property on account of the said judgment: the arrest of the said *Macpherson*, and his discharge by the consent of the plaintiffs, operating in law as a discharge of all further remedies on the said judgment."

Judgment.

This action, therefore, is brought to recover from the defendant the amount of a *joint* judgment, recovered against him and two others after one of the defendants has been arrested on a *ca. sa.*, and discharged from custody by the plaintiffs.

The defendant pleads the arrest and discharge of his co-defendant in bar of this action, and in the third plea alleges that thereby the plaintiffs' judgment was satisfied. The plaintiffs demur to such plea, on several grounds, the principal of which is that the arrest and subsequent discharge of one defendant is not such a satisfaction and extinction of the judgment as to discharge another defendant from all liability thereon.

The case of *King and another* v. *Hoare* (*a*) strongly

(*a*) 13 M. & W. 494.

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supports the plea. It establishes that a judgment (without satisfaction) recovered against one of two *joint* debtors, is a bar to an action against the other, and is pleadable in bar and not in abatement. Then, if one of several joint debtors cannot even be sued after a recovery of judgment against another of such joint debtors, any act of the plaintiff by which, after judgment against all parties liable on a note or other obligation, one of such parties is released from his joint liability, operates in law as a release to all. In the case of *Clarke* v. *Clement and English*, (*a*) it was held that if a plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards re-take him or take any of the others. In that case, the defendant *English*, having been taken on a *capias ad satisfaciendum* issued against both the defendants, was set at liberty by the plaintiff on an undertaking by him to render himself on a given day if he did not in the meantime pay the debt; on which the defendant *Clement* moved that the writ of *ca. sa.* should be quashed, and satisfaction entered on the roll. In the argument it was contended that, allowing one defendant to go out of custody in execution on his promise to render himself again, is no satisfaction of the plaintiff's debt; and though it might be doubtful that he could be re-taken, yet that his being let out of custody was no reason why the other defendant should not be taken; and at all events, that there was no pretence for making the latter part of the rule, as to entering satisfaction on the roll, absolute. After the rule obtained by *Clement* was disposed of by an order that *he* should not be taken on the writ, the plaintiff sued out a separate execution against *English*, and arrested him again: on which a rule was obtained to show cause why he should not be discharged out of custody, and the *capias ad satisfaciendum* set aside, and satisfaction entered on the roll on an affidavit disclosing the facts, and also those which

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(*a*) 6 T. R. 525.

appeared on the former application. Cause was shewn against that rule, and it was urged that the defendant *English*, having given an undertaking to render himself before the *ca. sa.*, was estopped from making the objection. In supporting the rule, the cases of *Vigers* v. *Aldrich*, (*a*) and *Jacques* v. *Withey*, (*b*) were cited. The court were of opinion that the plaintiff was wrong on both points, and made the rule absolute. In the last mentioned case, where a prisoner in execution was discharged by the consent of his creditor upon giving a fresh security to satisfy the judgment, which security was afterwards defeated on account of a mere informality, the judgment was considered satisfied, and could not be set off against a demand of the plaintiff.

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In a subsequent case, *Tanner* v. *Hague*, (*c*) the defendant, having been charged in execution at the suit of the plaintiff, was discharged, on his undertaking to pay the debt at a future day. On non-payment at the day, plaintiff sued out a *fieri facias* against him. A rule was obtained to show cause why the *fi. fa.* and the proceedings on it should not be set aside; to which it was replied in argument that the release of the defendant was conditional, and that as the condition was not performed, the plaintiff had a right to sue out another writ of execution. The court held that several cases cited in support of the application proceeded on the ground that it was considered that the plaintiff received a satisfaction in law by having his debtor in custody in execution, and made the rule absolute.

Judgment.

A much more recent case, *Cattlin* v. *Kernot*, (*d*) is to the same effect as *Tanner* v. *Hague*. In that case, in which all the former cases were cited, the court held that the discharge of a defendant from custody under a *ca. sa.* operated in law as an absolute satisfaction of a judgment. In delivering judgment in this case, *Williams*, J., said

(*a*) 4 Bur. 2482.
(*b*) 1 T. R. 557.
(*c*) 7 T. R. 420.
(*d*) 3 Com. B. N. S. 796.

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that the only doubt he entertained was, whether it was compulsory on the court to enter satisfaction on the judgment roll:—"It may be taken, upon the affidavits, that Mr. *Cattlin* consented to the discharge of Mr. *Kernot* upon an agreement that, if he would so consent, Mr. *Kernot* would abstain from controverting the proceedings under the fiat against him in bankruptcy; and that, notwithstanding he made the agreement, Mr. *Kernot* did contest the fiat, and ultimately procured it to be superseded. The question is whether, under these circumstances, the discharge of Mr. *Kernot* from custody operated as a satisfaction of the judgment debt? It seems to me to be impossible, upon the authorities, to entertain a doubt; and I think it impossible to get over the case of *Lambert* v. *Parnel*, (*a*) where the Court of Queen's Bench ordered satisfaction to be entered in a case precisely like this; that undoubtedly is in accordance with all the authorities." The rule in that case was, for the plaintiff to shew cause why a memorandum of satisfaction should not be entered as to the judgment signed in the case of *Cattlin* v. *Kernot*, on the 21st of January, 1847, for £546 16s. 1d., and £5 14s. costs, and registered pursuant to the statute 1 & 2 Victoria, chap. 110, charging the estate of the defendant, "the debt and costs having been satisfied."

Judgment.

In that case, though the defendant had violated an agreement on which his discharge from custody was obtained, after able argument and full consideration of the circumstances, the court made the rule to enter satisfaction absolute.

The only ground on which that application was made, was that "the debt and costs had been satisfied," though not in any way except by being discharged from custody.

The facts admitted on the pleadings in this case are,

(*a*) 15 L. J. Q. B. 55, 10 Jur. 31.

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that the judgment was recovered, on a bill of exchange drawn by the defendant on *Macpherson & Crane*, and accepted by them for the defendant's accommodation, against the defendant and *Macpherson & Crane*; that a *ca. sa.* was sued out upon that judgment, on which *Macpherson* was arrested; and that while he was a prisoner on the gaol limits, the plaintiff discharged him from custody; and that the plaintiffs have not received any money or other property in payment or satisfaction of their judgment. It appears to me from the cases cited that the arrest and discharge of one of the joint debtors operates in law as a satisfaction of the judgment, and that the plea setting forth the arrest and discharge is good, and the defendant entitled to judgment on the demurrer. I am not aware that there is any thing peculiar to distinguish this case from other cases of joint judgments, in which after arrest and discharge from custody the courts have felt themselves bound to order satisfaction to be entered. The suit in which the plaintiffs' judgment was recovered was brought on a bill of exchange against the drawer and acceptors, under the 23rd section of the act of this province, (Con. Stat. U. C., chap. 42,) which enacts, "that the holder of any bill of exchange or promissory note may, instead of bringing separate suits against the drawers, makers, endorsers and acceptors of such bill or note, include all or any of the parties thereto in one action, and proceed to judgment and execution in the same manner as though all the defendants were joint contractors." The plaintiffs have availed themselves of that act, and have sued all the parties to the bill of exchange in one action, as though they were joint contractors, though it was not compulsory upon them to do so. If they had brought several actions, as they would have been obliged to do before the passing of the act 13 & 14 Victoria, chapter 59, they would have been entitled to disbursements only in one of the suits, and to full costs in the other; but the difference as to the amount of costs to which they would be entitled could not, in suing for so large an amount,

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have formed any consideration to induce the plaintiffs to adopt the mode of proceeding authorised by the statute. The act, I think, affords a facility in enabling all the parties to a bill or note to be sued in one action; and in that action a judgment against all may be obtained, either jointly, as in this case, or severally, as may be thought desirable by the plaintiff.

The judgment sued on is against all the defendants jointly, and I can discover nothing to distinguish it from all similar judgments, nor can I perceive any reason why it should not be discharged in the same manner. In the second replication to the third plea, the plaintiffs endeavour to show that because the bill on which the judgment is recovered was made by the defendant and accepted by the other defendants for his accommodation, therefore he is not entitled to be discharged by reason of *Macpherson* having been discharged from custody. I do not see that the defendant's position in reference to the original cause of action can in any way affect his position as one of the defendants in a joint judgment. The plaintiffs might have urged the facts stated in their replication, it they had failed to give defendant, as the drawer of the bill, notice of its dishonour after acceptance; but after the bill has become merged in the judgment, and all are jointly liable to pay the amount, they cannot, I think, go back and urge such an objection to a discharge from the judgment—a discharge which they, by their own act, have placed within his reach. In my opinion the defendant is entitled to judgment on the demurrer to this replication to the third plea.

Judgment.

The 26th section of chapter 42, Consolidated Statutes of Upper Canada, provides that the rights and responsibilities of the several parties to any bill or note, as between each other, shall remain as though that act had not been passed; (saving only the rights of the plaintiff, so far as they may have been determined by the judg-

ment;) the rights of the plaintiffs as payees and holders of the bill have been determined by the judgment, and by that the defendants are jointly liable, and cannot be treated as if each could be held independently of the others for the payment of the whole amount. 1863. Holcomb v. Henderson.

I quite agree with the judgment of the learned Chief Justice of the Common Pleas, that the defendant is entitled to judgment on both the demurrers.

VANKOUGHNET, C.—I am in favour of affirming the judgment of the court below in this case. I think the legislature did not intend to place the plaintiff, who proceeded by the course which they at least advised, and, so far as they could, by penalty enforced, in a worse position after judgment recovered against the several parties to a note, than he was in as to them before judgment; that is, that they did not in any way mean to alter his rights in regard to them. The record of the judgment itself shows the relative positions of the several parties to it, and that it was recovered under the statute permitting such form of procedure. No extrinsic evidence for this purpose is required; there is no going behind the record to ascertain it; it is spread out on the face of it, and the way in which a joint judgment and joint execution were obtained there appears; and it seems to me it is but effectuating the intention of the legislature, and working out the spirit of the act, to hold that upon such a record the parties severally liable are to be treated as though several judgments had been recovered against them, but enforcible by one execution. The plaintiff may, under the act, make all or any of the parties to the note defendants in one suit. He is not, by abandoning several actions against all, compelled to treat all as joint contractors; he may select the maker and one endorser of a note, and sue them together, and bring separate actions against the remaining endorsers, subject only to the penalty of being deprived of costs; but without his rights in or subsequent to such action being affected Judgment.

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Holcomb v. Hendersen.

by the action in which he has joined the others. The judgment is but the cord which binds together the sticks. The defendants are fixed by it so that they cannot dispute their joint liability to the plaintiff thereunder; but each is, as to the character in which he has been made and is so liable, as much an unit as is every stick in the bundle. Section 26 of the Consolidated Statutes, chapter 42, which provides that the rights and responsibilities of the several parties to any such bill or note as between each other shall remain the same as though the act had not been passed, saving only the rights of the plaintiff so far as they may have been determined by the judgment, means, I think, nothing more than this, that the several defendants shall have their recourse, the one against the other, according to their relative liabilities, as though they had been separately sued or called upon to pay, in their several capacities of endorser, drawer, accommodation acceptor, or as the case may be; but that as regards the plaintiff, their liability to him, as determined by the judgment, shall not be disturbed—that it shall not be open to any of the parties against whom he has recovered judgment, and who may afterwards be compelled to pay, to allege that he became liable on the note only for the plaintiff's accommodation, or that in any other way the plaintiff is liable to him.

Judgment.

DRAPER, C. J., retains the opinion expressed in the court below.

ESTEN, V. C.—I have looked at all the cases that were cited, and have come to the conclusion that the judgment of the court below is right. I think the plaintiff is in the same position as if several judgments had been recovered. There is a merger, no doubt, but a several merger. The intention of the act of parliament was, not to prejudice the plaintiff; only that there should be one action and one judgment, but not that the parties should stand in any different situation as amongst themselves. The replication here sets up, in effect, that the

defendant who was discharged was only a surety, and the now defendant was the principal debtor. 1863.

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SPRAGGE, V. C.—Upon reading the several clauses of the act which bear upon this question, one is impressed with the conviction that the one object of the legislature was to enable the holders of bills and notes, and in a sense to compel them, to sue all parties liable to them upon the instrument in one action, without disturbing the rights of the parties as between one another. In the 26th clause, which creates the difficulty, this intention is manifested as strongly as in any other. In express terms it leaves the rights of all parties as they were under the old form of proceeding, with, as I read the clause, one exception expressed, "saving only the rights of the plaintiff, so far as they may have been determined by the judgment;" which I take to mean that the rights of the plaintiff, as determined by the judgment, are to stand as so determined.

Judgment.

One naturally enquires, with what object this "suing" was introduced. A reason may readily be suggested. The plaintiff might fail as to one or more defendants, or as to all. Suppose him to fail as to one, and to succeed as against the others, if the clause had stood "the rights and responsibilities of the several parties to any such bill or note as between each other shall remain the same as though this act had not passed," and had stopped there, there might be room to contend that it enabled the plaintiff to proceed in another action against the defendant, as against whom he had failed in the action in which he had joined him with other parties; and literally the words used would cover such a case, but for the provision which excepts the plaintiff's rights so far as they may be determined in the action under the statute. It is not necessary to say that a court would have so adjudicated; the legislature may have added this provision to obviate a doubt. It is sufficient to show that under circumstances which might arise in working

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the act, a result might have followed (or the legislature might have thought so) which it was deemed advisable to provide against.

MORRISON, J., thinks the judgment of the court below was right.

Per Cur.—Appeal dismissed, with costs.

RICHARDS, J., who was present when judgment was pronounced, said he still retained the opinion expressed by him in the court below, but, not having been present on the argument of the appeal, gave no judgment.

[*Before the Hon. Archibald McLean, C. J., the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. H. Draper, C. B., C. J. C. P., the Hon. V. C. Esten, the Hon. V. C. Spragge, the Hon. Mr. Justice Richards, the Hon. Mr. Justice Morrison.*]

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

JAMIESON v. FISHER.

Dower—Jointure—Marriage settlement—Lex loci rei sitæ.

By a marriage contract executed in Lower Canada the intended wife, in consideration of certain provisions made therein for her separate benefit, agreed to renounce her dower in the lands of her intended husband, either "*customary, prefix, or stipulated,*" no mention being made of lands in Upper Canada. *Held*, that this did not preclude her from claiming dower out of lands in Upper Canada, held by her husband during the coverture; and that notwithstanding the contract which was entered into would form a first charge on all the property which the husband held at the time of the contract, or which might be afterwards acquired by him.
[VANKOUGHNET, C., dissenting.]

Statement.

The action in the court below was by *Margaret Fisher*, widow of *John Fisher*, deceased, against *James Jamieson*, seeking to recover dower in certain lands in the township of Hungerford; the declaration in the cause setting out in detail the lands in which the demandant so claimed dower.

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Jamieson v. Fisher.

The defendant, for equitable plea, said, "that before the marriage of the said *Margaret Fisher* with the said *John Fisher*, heretofore her husband, namely, on the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and twenty-one, a certain marriage contract in writing was made and entered into at Quebec, in Lower Canada, by and between the said *John Fisher*, of the one part, and *Margaret Hunter*, of the other part, and which marriage contract is a good and valid marriage contract and settlement by the law of Lower Canada, in which said marriage contract it is recited, that a marriage was shortly about to take place between the said *John Fisher* and the said *Margaret Hunter*, and it was thereby stipulated and agreed, that the goods and chattels, lands and tenements, which they each of them had, as well as those which they should thereafter acquire during the said marriage, should respectively be the property of each of them, by whom the same should be acquired, and the demandant did thereby stipulate and agree, that in case she survived the said *John Fisher*, she should not be entitled to have or hold any dower of and in the lands of the said *John Fisher*, or whereof he should have been or be seised at any time during their marriage, and the said *Margaret Hunter*, did thereby renounce all claim or right thereto, for the future, and the said *John Fisher*, did by the said presents, stipulate and agree that in the event of the said *Margaret Hunter* surviving the said *John Fisher*, she should take by title paramount, besides what should belong to her by the said presents, all such effects, clothes and linen, which should be there found, together with his watches, rings and jewellery, and the said *John Fisher* did also agree to give to her, if she survived him, the sum of three hundred pounds of lawful money of Canada, to be paid to her cash in hand, and also did give to her, in case she should survive him, the sum of one hundred pounds per annum, payable half-yearly in advance, so long as she should live, and with the payment of all which the said *John Fisher* did charge his lands and tenements, goods and chattels, and the said contract was made and executed by the said parties, respectively, on the said twenty-sixth day of October, in the year of our Lord one thousand eight hundred and twenty-one, and the said *John Fisher* and the said *Margaret Hunter* afterwards were duly married, according to law, and the said *John Fisher*, after the said marriage, and during his life-time, bargained and sold the tenements in the

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Jamieson v. Fisher.

plaint mentioned to the Commercial Bank of the Midland District, and the said *John Fisher* afterwards departed this life, and the tenant further saith, that the said demandant, after the death of the said *John Fisher*, demanded, took and received the said goods and chattels, lands and tenements, which by the said marriage contract were agreed to be her proper goods and chattels, lands and tenements, and after the death of the said *John Fisher*, then took, had and received, the said sum of one hundred pounds annually, of the moneys of the said *John Fisher*, in the hands of his personal representative year by year, from the day of the death of the said *John Fisher* hitherto, so stipulated and agreed for in the said marriage contract, and the sum of three hundred pounds, payable to her on her surviving the said *John Fisher*, and also the clothes and linen with the watches, rings and jewellery, of the said *John Fisher*, at the time of this decease, and the tenant says that the contract and the acceptance of the provision therein made for the said demandant, are a good and sufficient jointure and release of dower, and that the demandant hath elected to take the same in lieu of dower."

Statement.

And for a second plea on equitable grounds, that "the said *John Fisher* after his marriage with the said demandant, was seised of and in the tenements in the plaint mentioned, and during his life-time sold the same by deed of bargain and sale by way of mortgage to the Commercial Bank of the Midland District, for a good and valuabe consideration, namely, for the sum of one thousand three hundred and sixty-one pounds seven shillings and seven pence, and therein covenanting among other things that the said bargainees and their successors and assigns should and might at all times thereafter peaceably and quietly have, hold, occupy and enjoy the said tenements without the let, suit or incumbrance of the said *John Fisher* or any one claiming under him, and the tenant says that he is seised in fee simple of and in the said tenements, and that he derives his title thereto by deed through, from and under the said Commercial Bank, made to him after the said conveyance made by the said *John Fisher* to the said Commercial Bank, and the tenant further says that *John Fisher* afterwards departed this life, having first made his last will and testament in writing, duly executed according to law, and thereby devised to the demandant the whole of the revenue to be derived

from his estate in full of all benefit to be derived by the demandant from the said *John Fisher's* estate, not exceeding five hundred pounds per annum to be paid to the said demandant for her support and that of her children and their education, and the tenant further says that the said demandant after the death of the said *John Fisher* demanded, accepted and received the said sum of five hundred pounds, annually, from the time of the death of the said *John Fisher* hitherto, and the tenant says that the demandant claims title to dower as aforesaid by, under and through the said *John Fisher*, and not otherwise, and that thereby the demandant hath elected to take the same in lieu of dower, which falleth to her of and in the lands of the said *John Fisher*, deceased, and that her said dower was and is thereby waived and for ever barred."

The demandant took issue upon the fist plea.

And by way of second replication to the said first plea, said, "that at the respective times of the execution of the marriage contract in that plea mentioned, and of the marriage of the demandant and of the said *John Fisher*, the demandant was an infant within the age of twenty-one years, that by the said marriage contract no good and sufficient jointure binding on the demandant, (being an infant at the time of the marriage,) was provided, and that the demandant had never since the death of the said *John Fisher* accepted any of the provisions made by the said contract for the demandant, nor hath she elected to take any provision thereby made in lieu of dower."

Statement.

The demandant took issue upon the tenant's second plea.

The defendant joined issue, and at the trial called the plaintiff as a witness: in her evidence she swore—

"I was married on the 27th October, 1821, at Quebec, the marriage contract made the day before; I then resided at Quebec, *Fisher* at Montreal. I was born 16th January, 1802; I am not aware of the extent of *Fisher's* property when we married; Mr. *Fisher* died 3rd February, 1858, at Montreal; the house I live in now my husband bought and we have lived in since;

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stone house No. 44, St. Antoine Street, Montreal; I do not know its value; I occupied it; I consider it of more value than £1000, perhaps £3000; I remember signing the marriage contract before Mr. *Tetu*, the Notary in Lower Canada, *Fisher* carried on business in Montreal; I never claimed to hold property separate from his at any time; I cannot say what property he had when I married; I supposed I was marrying well and never had a reason to doubt that; I believe *Fisher* had no lands and houses when I married; the property called the farm in the will he bought after I married, and he parted with it long before he died; the furniture in the house when he died is there still and I occupy it; I was not paid the £300 mentioned in the marriage settlement; never got it; I never asked the annuity of £100 mentioned; all that my husband left when he died was the house and lot in Montreal, no money. He left property in Upper Canada, I believe; I never got any property from the estate; my son acted in the settlement of the estate; an inventory was taken of the effects and they are in the house still. The farm at the mountain was sold several years before *Fisher* died. I do not remember whether I signed off my right or not."

Statement.

Cross-examined.—"At the time of *Fisher's* death his affairs were rather embarrassed. My son was appointed to look after the estate. I have never, since *Fisher's* death, taken or appropriated any goods; just continued on living at the house and using the furniture. *Fisher* had been out of business several years. The farm was sold seventeen years ago. The family reside with me in the house; four of them live there. I have not signed away any thing in respect of the house I live in. The farm spoken of was a valuable one.

Hammond Gowan, a barrister and advocate in Quebec, was called as a witness, who stated, "I am familiar with the old law of Lower Canada. I look at the marriage contract. By the French law the widow is entitled to half of the property owned at the marriage, and of all acquired in direct succession, that is if there be no contract. This contract alters that. This contract is a perfect legal one in Lower Canada, and that though the plaintiff was not of age—her parents being parties. (Custom of Paris.) The customary dower attaches on immoveables. By this contract the amount

settled on plaintiff has the first claim on every thing which *Fisher* had or might acquire. On the property acquired, such as the house and farm spoken of, the annuity would not form the first charge, but if there is no other property at the time of the marriage sufficient to pay the charge, then those properties would be charged with that annuity as a first charge. The farm would be charged with the annuity in this case, unless she released it." *Cross-examined.*—"The marriage contract acts as a mortgage. It requires registry: doubtless this was registered."

The marriage contract, after reciting that it was entered into by *John Fisher* and the demandant (then a minor) acting through her father and mother, as also her brother, her friends and guardians, and stipulating, amongst other things, that each of the parties was to pay his and her own debts, proceeded as follows:

"It has also been stipulated, covenanted and agreed by and between the said parties that there shall be no dower, either *customary*, *prefix*, or *stipulated*, each of the said *John Fisher* and *Margaret Hunter*, the future husband and wife, renouncing by these presents the said dower to each of them as well for themselves as for their said heirs and assigns, for the future, and the said *John Fisher*, the future husband, as it is covenanted, stipulated and agreed by these presents that there will be no *communaute*, and the said Miss *Margaret Hunter*, the future wife: and being desirous of giving her marks of the sincere affection which he hath for her, and to secure unto her as happy a lot as his present circumstances will allow, he, the said *John Fisher*, the future husband, wills and desires, and it is hereby stipulated, covenanted and agreed between him and the said Miss *Margaret Hunter*, the future wife, assisted as above mentioned, that the, latter, if she survives the said *John Fisher*, the future husband, shall take as a *Preciput*, besides what may belong to her under or by virtue of the titles and acquittances herein above mentioned, all and every, the effects, clothing and linen which may be for her private use, together with her [his] watches, rings and jewellery." Statement.

"And in addition thereto, the said *John Fisher*, the

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future husband, hath given and doth give to the said Miss *Margaret Hunter*, the future wife, also if she survives him, the sum of three hundred pounds, current money of this province, to be at once paid unto her, and which she shall take either in money or in furniture, or moveable effects belonging to the estate of the said *John Fisher*, as she may think the most to her advantage, and this according to the valuation of the moveable property which may then be made."

"And lastly, the said *John Fisher*, the future husband, wishing to provide the said Miss *Margaret Hunter*, the future wife, with suitable maintenance, hath by these presents created and constituted in favour of the said Miss *Margaret Hunter*, the future wife, assisted as aforesaid, and accepting thereof, the sum of one hundred pounds, current money of this province of Lower Canada, of a life-rent and pension, being and forming the exact interest at the actual rate of the sum of sixteen hundred and sixty-six pounds thirteen shillings and four pence, current money of this province, said rent being payable in and by two equal payments of fifty pounds each every six months, and in advance to the future wife up to the time of her decease, (being until then a widow,) and which said life rent of one hundred pounds said currency, in the case of the said Miss *Margaret Hunter*, being then the widow of the said *John Fisher*, should think fit to marry a second time, shall from the day of such second marriage of the said Miss *Margaret Hunter* be reduced to the just half, and the heirs and legatees of the property of the late *John Fisher*, the future husband, shall be bound to pay the said Miss *Margaret Hunter*, from the day of her said second marriage, only the sum of fifty pounds said currency of the province, said sum being payable also by halves in and by two equal payments of twenty-five pounds currency each, in advance, to be accounted from the day of such second marriage of the said Miss *Margaret Hunter*, the future wife, up to the day of the decease."

Statement.

A verdict was taken for the plaintiff subject to the opinion of the court upon the evidence and facts; and after argument thereon judgment was delivered in favour of the demandant in Michaelmas Term, 1862, which is reported in the Common Pleas Reports, vol. xii., p. 601.

From this judgment the defendant (the tenant) appealed, on the ground that the first plea pleaded by him sets up a good defence by way of equitable jointure, and the evidence given at the trial supported the said first plea. 1863. Jamieson v. Fisher.

Against the appeal the respondent alleged that the marriage, seisin, and death of the husband being admitted, there was nothing shewn in evidence which in law disentitled her (the respondent) to the dower claimed.

Mr. *Strong*, Q. C., and Mr. *C. Patterson* for the appellant.

Had the settlement in this case been executed in Upper Canada, it would have been a good jointure in equity within the statute of uses, and being such would have operated as a bar of dower. To create such a bar it is not necessary that the settlement or contract of marriage should contain an express renunciation of dower; it will be sufficient if an intention so to renounce can be gathered from the instrument; so that if the court should be of opinion that the *lex loci rei sitæ* should govern, it would be sufficient. Here the contract was executed in Lower Canada, the parent of the intended wife being a party, so that although she is shown to have been an infant at the time of the execution of the contract, by the law of that province it is binding upon her. Statement.

The settlement was a good equitable jointure, and as such would have the effect of barring dower, even if the instrument had not contained any renunciation of such right; and the fact, that it is introduced into the contract in terms which it is alleged apply more to Lower than Upper Canada, will not impair its effect, particularly when, as in this case, the deed itself exhibits an intention and desire to make a provision for the intended wife.

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Amongst other cases, he referred to and commented on *Corbet* v. *Corbet*, (*a*) *Caruthers* v. *Caruthers*, (*b*) *Drury* v. *Drury*, (*c*) *Vizard* v. *Longden*, (*d*) *Killen* v. *Campbell*, (*e*) *Dyke* v. *Rendell*, (*f*) *Hamilton* v. *Jackson*. (*g*) *Bright* on Husband and Wife, p. 450. *Westlebury* on International Law, p. 383.

Mr. *Jellett*, for the respondent.

The *lex loci rei sitæ* is that which prevails as to the effect and capacity of the contract to deprive the widow of what would otherwise be a clear legal right. (*Story* on the Conflict of Laws, secs. 54, 63, 363, and 364.) But even if this were otherwise the evidence shows that the provision stipulated by the marriage contract has never been received, so that under such circumstances there can be no bar to the claim set up in the action, and the dower renounced is that in Lower Canada only, which limits the effects of the renunciation and forms no bar to the claim of dower in Upper Canada.

Argument.

Mr. *Strong*, Q. C., in reply.

The judgment of the court was delivered by

ESTEN, V. C.—The right in question is a right to dower in lands in Upper Canada. It must, therefore, be regulated by the law of Upper Canada. By the law of Upper Canada, a wife may be barred of dower by a jointure made pursuant to 27 Henry VIII., chapter 10, section 6, at law; or in equity by any reasonable provision made for her by way of jointure or for her livelihood or maintenance for her life, to take effect immediately on the death of her husband; and if an infant at the time of the marriage with consent of parents or guardians to

(*a*) 1 S. & S. 612.
(*b*) 4 Br. C. C. 500.
(*c*) 2 Eden 39.
(*d*) 3 Atk. 8.
(*e*) 10 Ir. Eq. 461.
(*f*) 2 D. M. & G. 209.
(*g*) 8 Ir. Eq. 197.

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which they may prudently consent. The bar is not necessarily founded on contract, for the wife needs be no party, and when she is an infant can be no party, to the transaction. It is a power given by law to the husband, who must however exercise it reasonably, for an unreasonable provision would be deemed fraudulent and void at law, and which is followed by analogy by courts of equity in cases of equitable jointure; at all events when the wife is an infant at the time of the marriage; for when she is of age, and therefore capable of contracting, and is in fact a party to the contract, it seems to depend entirely on the contract. There can be no doubt that the contract in question in this case was binding on the husband, and could have been enforced against him in any part of the world. Dower of lands in Lower Canada is expressly renounced, but not dower in lands in Upper Canada. The provision made for the wife consists of her linen, jewellery, &c., and a gross sum of £300 to be paid to her immediately on her husband's death. Neither of these provisions would suffice to bar her of dower, as they are not for her life. An annuity of £100 a year, however, to be reduced to £50 a year, is provided for her during her life, and it would appear from the time of the marriage, and it is added for her suitable maintenance. Now this annuity is not said expressly to be in bar of dower in lands except in Lower Canada. If it is to be a bar of dower of lands in Upper Canada it must be by implication. It is not called a jointure, which has been held to be a sufficient indication of an intention to that effect. But it is said to be for her suitable maintenance, and in the case of *Vizard* v. *Longden*, that expression or a similar one was held to be sufficient to make the provision a bar of dower. But when it is considered that this contract was concluded in Lower Canada, where the parties were domiciled, with exclusive reference as is evident to the law of Lower Canada, it would be too much, I think, to imply an intention to make this provision a bar of dower of lands in Upper Canada, where it does not appear that

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the husband had at that time any lands, and which do not appear to have been in the contemplation of the parties, from the use of expressions to which by the law of Upper Canada a particular meaning not in the contemplation of the parties is attached. I think the judgment is right, and should be affirmed.

VANKOUGHNET, C., said that he could not bring his mind to the opinion which the majority of the members of the court entertained. He thought that the provision in the marriage contract for suitable maintenance for the wife after the death of the husband should be taken and held as a provision for jointure in lieu of dower, and of all claim upon the husband's estate. It certainly seems as clearly so as the provision made in *Vizard* v. *Longden* affirmed by *Edward Sugden* in *Hamilton* v. *Jackson*, to be unquestionable law. It seemed to him that it made no difference that the contract was made in Lower Canada. The question was, did the contract provide against the claims which as widow she would otherwise have on the husband's estate? He thought it did, but he agreed that the appeal should be dismissed, as the plea did not properly set up the provision for maintenance in lieu of dower. The plea alleged an express release of dower, and an election by the widow to take the provision made by the contract, neither of which was proved. The annuity of £100 per annum seems not stated by the plea to be in lieu of dower, or by way of jointure.

Judgment.

Per Curiam.—Appeal dismissed with costs.

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Partnership—Partners retiring to be indemnified by the continuing partners.

A. and B., a trading partnership, entered into a joint speculation with C. & D. for the purchase and sale of lands; afterwards E. was admitted into the concern upon the understanding that each should be entitled to one fourth of the profits, and liable in the same proportion to any losses incurred. For the purpose of carrying on the business of the co-partnership, the parties were in the habit of discounting notes which were made by E., and endorsed by A. & B. and by C. and D. in their individual names. After the partnership had been in operation for nearly three years C. wrote to A. & B. and E. proposing to retire from the concern on receiving a certain amount in lands taken at a valuation, he agreeing for a certain period to continue to endorse renewals of the notes of the firm then outstanding, as accommodation endorser, which proposal was communicated to E., but nothing further was then done with regard to it. Shortly afterwards D. made a similar proposition to A. & B. and E. on their "assuming all my share of the liabilities incurred by or for the said company, excepting only my liability for 12 or 15 months as accommodation endorser after Mr. Knowlson [C.] on the paper in the Bank of Upper Canada," which proposal was accepted by A. &. B and E. Subsequently both C. & D. by a joint memorandum formally relinquished their interests in the company, but it did not appear that D.'s stipulation as to endorsing the notes was ever communicated to C. The notes so endorsed by C. and D. had been all consolidated into one note of £3,200, and upon a renewal of this note an action was subsequently brought against all the parties thereto, and a sale of D.'s lands was effected under the execution issued in that action, which realized only a portion of the amount. Thereupon D. filed a bill against C. seeking to make him, as prior endorser, pay the amount still remaining due in respect of the judgment, to reimburse D. what his lands had sold for, and also to make up the loss sustained by him in consequence of the sale of his lands at, as was alleged, a great undervalue. Under the circumstances of the case the court below treated C. and D. as co-sureties for the continuing partners, and as such liable only to make up the amount of the claim in equal proportions; and it appearing that C. had already paid more than his moiety of the demand ordered D. to repay the excess to him together with the costs of the suit, which on an appeal to this court was affirmed and the appeal dismissed with costs.

Per ESTEN, V. C.—Prior to the General Orders of 1853, (Rule 8, Order VI.,) it would have been necessary to make the continuing partners parties to such a bill unless it were shewn that they were insolvent: in which case that would afford a sufficient reason for not making them parties.

The bill in the court below was filed by *William Francis Harper* against *John Knowlson*, praying, under the circumstances therein stated, and which are sufficiently set forth in the head-note and judgment, that the defendant might be ordered to pay the Bank of Upper Canada the balance remaining unpaid on the judgment recovered by the bank, and to procure satisfaction to be

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entered on the roll thereof, and for indemnification of the plaintiff; that an account might be taken of the loss sustained by plaintiff by reason of the sale of his lands; payment of the amount by defendant, and for further relief.

The cause came on to be heard upon the pleadings and evidence in the court below before his Hon. V. C. *Esten*, on the 10th of February, 1862. After taking time to look into the pleadings and evidence, the following judgment was delivered by the Vice-Chancellor:

The facts of this case are as follows:

Statement.

In the year 1853 a partnership was formed called "The Lindsay Land Co.," consisting of the plaintiff, the defendant, and a firm composed of two persons named *McDermot* and *Walsh*. In 1854 another person joined them of the name of *Lang*. They were interested in the partnership in equal fourth parts, and entitled to profits and liable to losses in the same proportions. The object of the partnership was to purchase certain lands and mills, and after improving them and working them for a time to re-sell them at a profit. They expended a large sum of money in this way, which was raised by means of discounts procured from the respective agencies of the Bank of Upper Canada at Lindsay, and that of the Commercial Bank at Port Hope. The plaintiff was the agent of the Commercial Bank at Port Hope. The defendant was, after the formation of the partnership, appointed the agent of the Bank of Upper Canada at Lindsay, and continued to fill that office for about two years. The notes upon which the discounts were obtained were always in the same form, namely *Lang* being the maker and *McDermot* and *Walsh*, the defendant and the plaintiff, being the endorsers in that order. Previously to the month of June, 1856, the notes of the firm in the Bank of Upper Canada were consolidated into one note of £3,200, on which the members of the firm were parties in the respective characters, and in the order I have mentioned. At the same time the Commercial Bank held paper of the firm to the amount of £1,021 10s., of which *Lang* was the maker, and *McDermot* and *Walsh* and the defendant were endorsers in that order; the plaintiff being no party to it,

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inasmuch as he being the agent of the bank at Port Hope where the discount was effected, his name, it was thought, could not with propriety appear upon it. In the month of February, 1856, the defendant made a proposition to the company to retire from it on the terms of receiving about £10,000 worth of land according to a valuation previously made by *Lang*; of being indemnified against all liabilities, and of allowing the use of his name for about fifteen months in the renewal of the paper of the firm in the two banks. The proposition was favourably entertained by the other members of the firm, but no agreement was immediately concluded on the basis of it. About three months afterwards, on the 14th of May, 1860, the plaintiff also made a proposition to *McDermot* and *Walsh* and *Lang* for his retirement from the firm on nearly similar and equal terms. The clause which stipulated for indemnity against liabilities was in these words, namely:—"On your assuming all my share of the liabilities incurred by or for the said company, (excepting only my liability for twelve or fifteen months as accommodation endorser after Mr. *Knowlson* on the paper in the Bank of Upper Canada.") This proposition was accepted by *McDermot & Walsh* and *Lang*, in the terms in which it was made. It is quite certain that the plaintiff was made acquainted with the defendant's proposition, for it appears from a letter addressed by him to the defendant on the 16th of June, 1856, that he then had it in his possession, and he offers to furnish him with the heads of it if he had not retained a copy, to enable him to prepare, as he proposed that he should prepare, the bond to be delivered to him by the continuing partners. It does not appear, however, that the defendant was ever made acquainted with the contents and particulars of the plaintiff's proposition. He was perfectly aware, however, of the fact that such a proposition had been made, for in the transfer which was executed by him and the plaintiff and the continuing partners of the effects and property of the firm, except what they withdrew, mention is made of an agreement between the plaintiff and the continuing partners, dated the 19th of May, 1856. The 25th of June was appointed to consummate the arrangements that had been made, and to complete the dissolution of the partnership. On that day all the partners met, and a discussion ensued which lasted several hours. The principal subject of the debate seems to have been the time

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during which the renewal of the paper of the firm was to continue. The plaintiff advocated twelve months; *Lang* proposed eighteen months or two years; and the defendant suggested, as a compromise between the two periods, fifteen months, which was finally agreed upon, and the necessary writings were completed and exchanged. The note for £3,200 was several times renewed in pursuance of the terms of the dissolution. On one of these occasions, the plaintiff being asked for his endorsement, refused to affix it until the defendant had appended his endorsement, of which fact the defendant was informed, whereupon he affixed his name. The firm afterwards failed. *McDermot* & *Walsh* made arrangements for the benefit of their creditors. *Lang* became greatly embarrassed. An action was commenced by the Bank of Upper Canada against all the parties to the note, and judgment obtained, upon which execution having issued the plaintiff's lands were exposed for sale, when they produced about $7,500, a sum, as is alleged, far below their real value; and the present suit has been instituted by *Harper* against *Knowlson* alone, to compel payment of the debt remaining due, and re-payment of the part paid by the plaintiff, together with satisfaction for the loss sustained by the plaintiff in consequence of the sale of his lands at so great an undervalue. The question is, whether under the circumstances which have been detailed the plaintiff is entitled to any relief against the defendant. The relief prayed is founded upon the simple fact that *Knowlson* was a prior endorser on the note in question to the defendant, and therefore bound to indemnify him against it. Upon this ground he could no doubt recover what he had paid through the medium of an action at law; but he contends for the right to proceed in equity, in order to compel a prior payment of the part of the debt which remains unpaid, and no doubt this is a common equity administered to a surety. It is not disputed that the partners are among themselves equally liable for all the debts due by the firm to third persons, no matter in what order their individual names appeared on the notes and other negotiable instruments given by the firm, or whether they appeared at all. Thus it is conceded that they were all equally liable to the payment of the note for £3,200 held by the Bank of Upper Canada at the time of the dissolution, although *Lang* was the maker, and *McDermot* & *Walsh* were the first, and *Knowlson* the second endorsers on that note, and also equally liable to the payment of the note

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or notes for £1012 10s. held at the same period by the Commercial Bank, although *Harper's* name did not appear at all. If the liability of the partners has been varied in any way, it must be on account of something that occurred at or after the dissolution. If the retiring partners simply lent their names for the renewal of the paper of the firm without any special stipulation, it could hardly be contended that their liability as between themselves would be varied. No greater effect could be ascribed to the position of their names on the renewed paper than it produced on the old paper, of which it was a mere continuation. The use of the names being the result of express stipulation, part of the agreement of dissolution, in the absence of any special agreement as to their liability between themselves, the intendment would be that they continued liable on the new in the same manner that they were liable on the old paper. Both are entitled to be indemnified against it by the continuing partners; but in default of such indemnification, as between themselves they would be considered partners, and liable as such. This position, indeed, is not disputed; but it is contended that each partner could on his retirement make what agreement he pleased with the continuing partners, and that neither of them had any concern with the agreement made by the other of them; that, in point of fact, the two retiring partners did make separate and independent agreements of a different nature; that *Harper* stipulated for indemnity from *Knowlson*, while *Knowlson* made no stipulation except for indemnity from the continuing partners; that *Knowlson* should have acquainted himself with the terms of *Harper's* agreement, of the existence of which he was aware, and that *Harper* had a right to assume that *McDermot*, *Walsh* and *Lang* had communicated them to him. To these arguments I cannot accede. If it is conceded that in the absence of the express stipulation supposed to be contained in *Harper's* agreement, the intendment of law would be that as between themselves, the retiring partners, in default of the continuing partners indemnifying them, would be liable in equal shares, then *cadit quæstio*, because *Knowlson* being ignorant of any such stipulation must be deemed to have intended, according to the legal construction of the transaction, and this fact must have been apparent to *Harper*, and he therefore permitted him to enter into the engagement in ignorance of a right for which he had secretly stipulated and upon the supposition that no such right existed, and,

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having so acted, must be precluded from enforcing such right against him. It is said that *Knowlson* being aware of the existence of *Harper's* agreement was bound to enquire into its terms. But I cannot assent to this proposition, which is also somewhat inconsistent with the argument that each had a right to make his own agreement, and neither had any concern in the agreement of the other. *Knowlson* knew that he could not be deprived of any right by an agreement between *Harper* and the continuing partners, and he had a right to suppose that if his position was altered by it in any way to his prejudice it would be communicated to him. He was not concerned therefore to enquire, and entered into the engagement relative to the renewal of the paper without apprehension. It is then said that *Harper* had a right to conclude that the stipulation which he had made had been communicated to *Knowlson* by *McDermot*, *Walsh* and *Lang*. But it was *Harper's* duty to communicate it to *Knowlson*, and if he relied upon the continuing partners to perform that duty for him, and they failed to do so, he must be the sufferer who reposed confidence in them. But those gentlemen can hardly be blamed for not making such a communication, for they say, one and all, that they never understood that *Harper* stipulated for indemnity from *Knowlson*. *John Knowlson* first made his proposition to retire from the firm. *Harper* was a member of it, and, in offering the use of his name for a time for the purpose of renewal, *Knowlson* knew that he should have the indemnity of the three remaining members of the firm. Before this proposition had been conclusively accepted, *Harper* also proposed to retire from the firm. This, if carried into effect, would, of course, alter the position of affairs. Accordingly all the partners meet on the 25th of June to discuss the matter, and it is agreed after a protracted discussion as to the time during which the renewal was to continue, that both *Harper* and *Knowlson* should lend their assistance towards the renewal of the paper in the Bank of Upper Canada, and then the date of *Knowlson's* proposal is altered from some day in February to the 25th of June, and *Knowlson* must be considered as engaging to allow the use of his name, on the understanding that *Harper* was to do so likewise; and it appears to me that if at any time when *Knowlson* should be asked for an endorsation he should be informed that *Harper's* name was not to be appended, he might refuse compliance, and would be protected in such refusal by a court of

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equity. It is observable that *Harper's* name did not appear on the Commercial Bank paper, and no doubt was not to appear on the renewal of it, but I cannot doubt that under the circumstances of the case a particular reason existing why *Harper's* name should not appear, and no express agreement being made on the subject, the position of the parties would remain unaltered with respect to this paper. But supposing the case to be otherwise in this respect, and it is unnecessary for me to decide this point, yet the intendment must be the same with regard to the paper in the Bank of Upper Canada, on which *Harper's* name was to appear. I attach no importance to the circumstance that *Harper* refused his endorsation on one occasion until *Knowlson's* name was appended to the paper, and the communication of that fact to *Knowlson*, and his then attaching his name. The only idea that would convey to his mind would be that *Harper* was cautious and did not choose to endorse the paper unless he was sure that *Knowlson* would endorse it also. Such is the view I should entertain of this case, if the stipulation, or rather exception, in question contained in *Harper's* proposal really bore the meaning which has been attached to it. But I think it would be extremely unreasonable to attach any such meaning to it. *Ex hypothesi Harper* was making an important alteration in the relative positions and in the legal rights of the parties. Can it be supposed that this effect would be intrusted to a mere parenthetical exception to another term in his agreement, and not form the subject of a substantive stipulation unless upon the supposition that it was expressed ambiguously, in order that it might escape observation, and that *Knowlson* might be entrapped into an engagement which he did not intend? An unworthy object, which I would be sorry to impute to a gentleman in Mr. *Harper's* position. I think the expression "after Mr. *Knowlson*" in the exception to the stipulation for indemnity from the continuing partners, would not convey to Mr. *Knowlson's* mind, or to any reasonable man's mind, the idea that thereby an important change was intended to be made in their relative positions. In fact it did not convey any such idea to the mind either of *Knowlson* or of the continuing partners. A party intending to make an agreement to the prejudice of another, should express his intention in unambiguous terms, especially when the natural conclusion of the mind would be different, and the expression, as in the present case, being, to say the

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least, extremely ambiguous, I think the plaintiff is not at liberty to put upon it the construction for which he contends. I think, therefore, that the plaintiff is not entitled to treat the defendant as a surety to him, and to require him to indemnify him against the liability in question. In default of receiving indemnity from the continuing partners they are, as between themselves, jointly and equally liable. It does not appear in evidence, but it was understood at the argument, that *Knowlson* had paid more than *Harper*, and in this case not only can *Harper* claim nothing from him, but I think he is entitled to be re-paid by *Harper* a moiety of the excess. In this view of the case the plaintiff and defendant are co-sureties, and the continuing partners are principal debtors. I should think the proper form of such a suit, independently of any alteration in the practice, would be to make the principal debtors parties, and to pray relief against them in the first instance. The continuing partners are liable not only to *Knowlson*, but also to *Harper*, and *Harper* cannot make his case against *Knowlson*, without at the same time making *Knowlson's* case against the continuing partners. If, indeed, they are insolvent, it may afford a sufficient reason for not making them parties. A surety proceeding against a co-surety in equity to recover not merely a proportion of the debt according to the whole number of co-sureties, which is all he can recover at law, but a proportion of the debt according to the number of solvent co-sureties, is not obliged to make the insolvent co-sureties parties. But the evidence of insolvency does not seem sufficient. *McDermot* and *Walsh* merely say that they have made an assignment for the benefit of their creditors, and are not at present able to satisfy the plaintiff's and defendant's claim; and *Lang* merely says that he is embarrassed in his affairs. Independently of the late orders, I should think, therefore, that they would be necessary parties to the suit, but my determination on the main point probably renders this a matter of no practical importance; and under the eighth rule of the sixth general order they seem unnecessary parties. The defendant is, I think, entitled to his costs. If the plaintiff had made the demand upon the defendant, which alone he was entitled to make, I must intend, from the form the present contention has assumed, that he would have acquiesced in it, and that no suit would have been necessary.

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Whereupon a decree was drawn up declaring, "that each of the said parties was and is bound to indemnify the other of them to the extent of one-half of the amount claimable under the judgment of the Bank of Upper Canada in the said pleadings mentioned, and doth order and decree the same accordingly. And it appearing that the said defendant hath paid or caused to be paid and satisfied to the said the Bank of Upper Canada the sum of seven hundred and twenty-nine dollars and sixty-five cents in excess of one-half of the said amount, it is ordered that the said plaintiff do forthwith pay to the said defendant the said sum of seven hundred and twenty-nine dollars and sixty-five cents. And it is further ordered that the said plaintiff do pay to the said defendant his costs of this suit, to be taxed by the master of this court.

The cause came on to be re-heard before the full court on the 26th of May, 1862, when the foregoing decree was affirmed; whereupon the plaintiff appealed to this court, assigning as reasons of appeal:

Statement.

1. That under the circumstances of this case the respondent is a surety for the appellant in respect of the bill in question, and liable to indemnify him against the payment of the whole of it.

2. That the agreement made between the appellant and the remaining partners, contained in the letters of the fourteenth and nineteenth days of May, one thousand eight hundred and fifty-six, clearly stipulates for and obliges the remaining partners to obtain the prior endorsement of the respondent.

3. That appellant and respondent retired from the partnership with the consent of the remaining partners and of each other, each looking to the remaining partners for his general indemnity against the partnership debts, and without reserving any right the one against the other, and each making his own peculiar arrangement with the remaining partners independently of the other, and with the consent and acquiescence of the other in his so doing.

4. That each agreed to endorse, for a valuable consideration, moving from the remaining partners to himself

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the benefit of which he obtained and which was separate and distinct, and different from the consideration received by the other. The appellant's agreement to endorse was part of the consideration given by him for the one thousand five hundred pounds which the remaining partners were to pay him and the part of the assets he was to receive. It was competent to each to annex to his agreement any condition he thought proper, as he was not under any obligations to endorse at all.

5. That the partnership relation between the appellant and the respondent ceased when the original bill was taken up, and the ordinary relation of successive endorsers arose, both having become accommodation endorsers for the express purpose of enabling the remaining partners to pay off the partnership bill.

6. That each was bound to contribute to the payment of the original bill; but the remaining partners having agreed to pay it all, each of the retiring partners could agree to assist them to do so with his name to the same extent and subject to any stipulations as if they had never been liable upon the bill at all, and the remaining partners having actually paid off the original bill, the partnership relation and liability ceased, and the relation of successive endorsers arose.

Statement.

7. That the appellant was not bound under the circumstances to communicate to the respondent his arrangements as to endorsing for the remaining partners. They agreed to pay him one thousand five hundred pounds in money secured by their own notes and mortgage, not the money or mortgage of the partnership, but their own; each made his own bargain and the best bargain he could. If the appellant had agreed to endorse, and had not stipulated for the respondent's endorsement prior to his own, he would have been bound to endorse whether the respondent did or not.

8. That the position of the respondent was not injuriously affected by his ignorance of the appellant's stipulation, (even if he were ignorant of it,) inasmuch as the respondent agreed unconditionally to endorse, as appears by his proposal of the twenty-fifth June, addressed to the Land Company, which must mean the remaining partners, and he would therefore have been

compelled to endorse for them whether the appellant had agreed to do so or not. 1863.

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9. That it would be a fraud upon the appellant to deprive him of the benefit of a stipulation which he was at liberty to make, and upon the faith of which he acted, and deprived himself of the indemnity of the partnership assets, and of which the respondent must have been aware.

10. That upon all the facts of this case, as appearing in evidence, the appellant is entitled in equity to a decree against the respondent for the indemnity sought by him.

In support of the decree, the defendant assigned the following reasons:

1. Because the bill current at the date of the dissolution represented a partnership debt, to the payment of which the appellant and respondent, and the other partners of the Lindsay Land Company, were liable to contribute as partners, and the bill in question in this suit representing the same debt, it requires a contract between the appellant and respondent, to entitle the appellant to the position claimed by him, and no such contract exists or has been proved to exist. Statement.

2. Because the true and final agreement as to the renewal of the said bill was a joint agreement between all the partners, made on the occasion of the execution of the documents upon the dissolution, and which did not give the appellant any rights beyond those of the respondent in the premises, but which on the contrary in effect provided for the continuance of their then existing joint liability.

3. Because the respondent in the arrangement entered into by him for retirement manifestly acted on the assumption that the appellant and himself were and were to be equally liable for the renewals of the said bill, and it was a fraud in the appellant to conceal the alleged agreement made by him with the other partners, and it would be a fraud on the respondent to allow the appellant to insist on any such agreement.

4. Because the other partners of the Lindsay Land

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Company are necessary parties to any suit in which a decree could be made in favour of the appellant.

5. Because upon the whole facts of the case the appellant is not entitled to any relief against the respondent, and the decree is correct.

SIR J. B. ROBINSON, BART., Prest.—The facts of this case are fully stated, and I think quite accurately, in the judgment given in the Court of Chancery by Mr. Vice-Chancellor *Esten*, except in one particular, in which, if the fact had been stated as it seems to me to be, upon the evidence, it would have appeared that there was less to be said in favour of what the plaintiff was unsuccessfully contending for below, than the Vice-Chancellor appeared to suppose there was. I allude to that passage in the Vice-Chancellor's judgment, in which he appears to have been under the impression that the defendant must have been aware of the nature of the proposition which the plaintiff had made, to be allowed to withdraw from the partnership or association upon certain terms which he specified. The learned judge seems to have said that, under the impression that in the transfer which was executed by him and the plaintiff, and the continuing partners of certain effects and property of the firm, mention is made of an agreement between the plaintiff and the continuing partners, *dated 19th May*, 1856. The transfer spoken of must, I think, be the writing marked exhibit C in the appeal case, printed near the foot of page fifteen; but that makes no reference to the only paper dated 19th May, 1856, which is a letter from *McDermott & Walsh* and *Lang* to the plaintiff, in which the terms which the plaintiff had proposed are contained. For all that appears in the transfer spoken of executed by plaintiff and defendant, and dated 25th June, 1856, the defendant had not necessarily any knowledge that the plaintiff had stipulated that in any liability to be assumed by him upon paper to be held by the Bank of Upper Canada, he should stand in the position of accommodation endorser after Mr. *Knowlson*. The main facts of

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the case are, that the plaintiff and the defendant together with one *Lang* and a firm of *McDermott* and *Walsh* having associated together under the name of the Lindsay Land Company, for purposes stated in the bill, the defendant first and afterwards the plaintiff desired for certain reasons to leave the firm; and severally at different times made proposals to that effect to the others who would remain partners in case of their being allowed to withdraw. At the time this was under consideration the company had a note for £3,200 held by the Bank of Upper Canada, to which all members of the firm were parties, as makers or endorsers, which had been given for advances made by the bank, which note had for some time been kept afloat by renewals. The parties had signed in their ordinary names, that is the plaintiff, defendant, and *Lang*, each individually, and *McDermot* and *Walsh*, who were a trading firm for other purposes, in the name of their firm. They were all equally interested in the concern of the Lindsay Land Company, that is, the plaintiff, defendant, and *Lang* held each a fourth share, and *McDermot* and *Walsh* the other fourth.

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It was settled among them on the 25th of June, 1856, when it was finally arranged that plaintiff and defendant might both withdraw and on what terms. That independently of certain mill property, which it was assumed was about equal in value to the company's debts, the plaintiff and defendant should each receive a portion of the other lands held by the company, estimated to be equal in value to a fourth of the whole; that the remaining partners should indemnify the two who were retiring against all debts that had been incurred while they were together, (of which clearly the £3,200 note was one,) and as the partners who were to continue in the business wished to avoid being driven to sell property at a sacrifice in order to meet that note, they exacted of the plaintiff and defendant that they should agree to lend their names for fifteen months longer, as they had

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done before, upon such paper as it might be necessary to offer to the Bank of Upper Canada to obtain renewals, and thus enable the remaining partners to liquidate the £3,200 note gradually. The bank had gone on renewing the note till March, 1858, when they insisted on its being paid at maturity; brought an action against all the parties to the note and obtained judgment; and *Lang* & *McDermot* and *Walsh* having as it appears no means of paying, some lands of the plaintiff were sold under execution, out of which seven thousand six hundred and twenty-two dollars were made, leaving still due the difference between that and the amount of the judgment and interest. The defendant, on his part, has paid up more than half of the judgment, and contends that he can be liable for no more than half.

The plaintiff on the other hand insists that the defendant, as being an endorser before him on the note, should be made to pay up the balance of the judgment, and to indemnify him from all loss and liability that he has incurred by reason of the judgment: including a great loss by the sacrifice of his lands under their value at the sheriff's sale.

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The defendant while he admits his liability to the bank for the whole amount of the judgment denies that under the circumstances he is bound as between him and the plaintiff to bear more than an equal share with the plaintiff.

The plaintiff founds his suit upon the fact that the defendant endorsed the note before him as an accommodation endorser at the request of *Lang* & *McDermot* and *Walsh;* and he claims the benefit of the ordinary rule of law in such cases which treats the prior endorser as surety for those who endorse after him, and so liable to save them harmless to the full extent against the note.

The defendant denies that because his name was

placed before that of the plaintiff upon the note, he is therefore to be treated as coming within the general rule, without regard to the nature of the transaction which led to the note and to the circumstances which surrounded it.

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We think the Vice-Chancellor took the right view of the case, and decided properly in favour of the defendant. There are many cases in the books in which it has been made a question in courts of law whether a person who had become a party to a note in a particular capacity, for instance, as one of two joint makers, without any thing to denote that both were not undertaking as principals to pay the debt, was not at liberty to show that he was in fact only a surety for the other, and was not undertaking on his own account. It might be of consequence to him to make that appear, in order that he might avail himself of the defence, that there was an agreement to give time to the principal, by which he as surety was discharged.

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The decisions at common law were not quite uniform, but in general the principle prevailed that at law the position of the parties must be taken to be such as the note imports, and that extraneous evidence to vary it could not be received. What is contended for here is the converse proposition, namely, that a person, who, from his position on a promissory note, would on general principles be assumed to have engaged to indemnify against all liability any party who should endorse after him, may be allowed to shew that in the particular case that consequence should not be permitted to follow; but that he and the subsequent endorser were in fact understood to be incurring as between themselves an equal responsibility, so that although either was unquestionably liable to the holder of the note to the full extent of the promise which the note imported, yet that as between themselves neither was undertaking for the other, but each assuming a liability which both were bound in the event to bear

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equally between them: neither being left to bear more than his share. The same principle must govern both classes of cases. These questions at law will now be seldom raised since the defendants have been allowed to put equitable defences upon record. I refer to the case of *Pooley* v. *Harradine*, (*a*) and to *Purley* v. *Loney et al.* (*b*) There can be no doubt now, that if the plaintiff had paid the whole note and sued this defendant at law to recover from him the amount on the principle that as the prior endorser he was bound to save him harmless, the defence which is here set up by the answer could have been pleaded at law as an equitable defence; and here the parties are discussing their rights in a court of equity, where beyond all doubt their just position in regard to each other, according to the truth of the case, could always have been shewn.

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This subject is more fully discussed in Mr. *Pitman's* Treatise on Principal and Surety, (*c*) than in the text books on bills and notes. I refer to the case of *Craythorne* v. *Swinburne*, (*d*) and *Dering* v. The Earl of *Winchelsea*. (*e*) The latter case was on the equity side of the Court of Exchequer and was cited at length in the common law case of *Cowell* v. *Edwards*. (*f*) Both decisions touch upon points which it is necessary to consider in the present case.

If we consider that the debt out of which the note for £3200 grew, which was severally endorsed by these parties, was a debt for which the plaintiff and defendant were liable to the full extent in common with the other members of the firm, and for which they had not only been liable, but were still liable notwithstanding the change made in the firm; and if we consider also, that any one of the parties paying the whole of it, or more than his proper proportion, could make the others

(*a*) 7 Ell. & Bl. 431.
(*b*) 17 U. C. Q. B. 279.
(*c*) Ch. 14, pt. 8, pp. 146 to 156.
(*d*) 14 Vesey, 160.
(*e*) 2 Bos. & P. 270.
(*f*) 2 Bos. & P. 268.

all contribute their due proportions, if they had the means of doing so. The conclusion is irresistible, that neither the circumstance of embodying the debt in a note, nor the accident of the order in which they became parties to the note, could be allowed in the view of a court of equity to make any difference. The liability would be traced up to the source, though it would no doubt be allowed to be affected and varied by any arrangement that the parties might be shown to have entered into with that view. It might, by agreement among themselves, have been made in substance, if not in form, the debt of one or of two of them, instead of the debt of all.

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If there be no evidence, as there clearly is not, that on the 25th of June, 1856, the four partners to the firm understood and agreed among themselves that the debt then due to the Bank of Upper Canada should be made henceforward, not as regarded the bank, but among themselves the debt not of all the original partners, but of one or more of them, then such agreement would as among themselves have governed their relative rights and liabilities.

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In the absence of any such common understanding, the plaintiff rests his case, I think, upon these four points:—

1st. That they were not in fact partners, but joint land holders, and were therefore—as I suppose he would contend—to be looked on like any other four parties making and endorsing a note in their several names, and using no collective name of business.

2nd. That on the notes preceding this on which the bank had made advances and which ended in this £3,200 note, as the last renewal, he the defendant had always endorsed first and the plaintiff had endorsed after him; and that on all of them the plaintiff being the last endorser was on principle entitled to claim indemnity from any prior endorser.

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3rd. That the plaintiff had made it a condition with the continuing partners that he was to endorse after the the defendant, and was allowed by them to retire on that understanding.

4th. That he had refused on one occasion to endorse until after the defendant had endorsed, and that this being made known to the defendant he, the defendant, afterwards endorsed the paper before the plaintiff put his name on it.

As to the first point, they were in fact all partners in the variety of business they were to carry on, not merely joint tenants of real property. The plaintiff himself so considered when he wrote his letter of the 14th of May, 1856. This letter was as follows:

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"I beg to submit to you the following proposition:—I will dispose of all my interest in the property and assets of the *Lindsay* Land Co., on your assuming (or yourself and *R. Lang*) all my share of the liabilities incurred by or for the said company, (excepting only my liability for 12 or 15 months as accommodation endorser after Mr. *Knowlson* on the paper in Bank U. Canada,) on the following terms and conditions:—

1. £500 and interest to be paid me 1st May, 1857.
£500 do. do. do. 1858.
£500 do. do. do. 1859.
For all which notes are to be given with the name of *R. Lang*, and secured by mortgage.

2. Land to the amount of £9,500 at *R. Lang's* valuation, part of 20 and 21, 6th con. of Ops, and 21, 5th con. Ops, to be assigned to me, and to be chosen by lottery or otherwise as may be agreed on, giving me one-fourth part of all the unincumbered property, and the balance of the amount in lots encumbered by bank mortgage only, with the understanding that when there is question of further release by the bank the land held by the different partners (of the present company) is to take precedence of the mills and mill-reserve.

3. One other condition I ask, namely, of offering for

sale lots, alternately with the new company, at your next auction sale in Lindsay, and it is, of course, to be understood that existing mortgages to extent £5,000 are to be lodged with Bank U. C. as collateral security for the original mortgage of the company to the bank."

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And if the bank chose to require, or if they preferred among themselves to use several names, instead of the name of the firm to obtain money upon the credit of all, and for the use of all, they would by that means be creating a partnership debt, no less than if they had borrowed the money upon a note made simply in the name of the firm, and endorsed by no one.

As to the second point, it could be of no consequence in any litigation among themselves in what order they placed their names upon the note, since they adopted that mode of creating that security for their joint benefit. Some must have signed before the others, and the order in which they happened to sign could not be important in a question among themselves, in the view of a court of equity.

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As to the third point. It is true that in the plaintiff's letter to *McDermot* and *Walsh*, of the 14th of May, 1856, he did propose to them that he "would continue liable for twelve or fifteen months as *accommodation endorser after* Mr. *Knowlson* on the paper in the Bank of Upper Canada. Mr. *Knowlson* had some months before that, (February 12th, 1856,) in his own proposition made to his three co-partners, (*i. e.*, including the plaintiff,) to be allowed to retire from the firm, had stated this: "And my name can be had for a limited time to the paper required for retiring the bills now in the Upper Canada and Commercial Banks." The two propositions were not, for any thing that appears, made in concert, but independently of each other. It was well enough for the plaintiff to write to *McDermot* and *Walsh* that he would sign after the defendant as accommodation endorser, but for the accommodation of

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whom? It could only be in fact of the whole firm, in one sense, for all were liable to the bank for the whole amount both in law and equity; and if he had explained to *McDermot* and *Walsh*, that in putting his name after the defendant's he would do so with the view of making the defendant re-pay to him all that he might have to pay in consequence of such endorsement, how strange an idea must that have appeared to them when they would be all joining in the note in order to secure a debt for which all were in law and equity equally liable? and of which, as among themselves, none could be made to pay more than the others, without having a claim on the others, to be reimbursed in the excess, unless they should come into an express arrangement to the contrary. If either *McDermot* and *Walsh* or *Lang* had explained to the defendant that the plaintiff had made this particular proposition, and with what view, how could they expect to reconcile him to the justice of it, and to obtain his consent on any principle? and with what shew of reason could the plaintiff have asked the defendant to become an endorser with him upon the note on such very unequal terms? They both had gone into the company on equal terms, and were about being allowed to withdraw on terms intended to be equal, though the defendant has shewn that in the arrangement the plaintiff came off with a better share than he did. It would be taking an unfavourable view of the plaintiff's conduct to suppose that abstaining, as he seems to have done, from making the defendant aware of the consequences which he intended to insist upon of coming after him as an endorser, he did at that time, nevertheless, conceive in his own mind the idea of contending for such consequences at a future day. We should rather, when the justice of the case is so plain, be disposed to think that the plaintiff, while they were all apparently hopeful and in solvent circumstances, meant nothing more by using the words "as accommodation endorser after Mr. *Knowlson*," than that if he went out and still endorsed for the firm's accommodation,

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he would not sign till all had signed who were to remain liable for the debt. He knew that although the defendant had desired to withdraw, he had not withdrawn. So long as he might remain he would be one of the parties accommodated, and whether he should withdraw or not, the plaintiff would probably have been unwilling to endorse without him, and could not in reason be expected to do so. By saying he would endorse after him, he might, naturally, on a view of the circumstances, be only understood as being solicitous or determined not to run any risk of losing the defendant's responsibility of endorsing without him; and that would be best provided for by seeing before he gave his own signature that the defendant had given his.

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A banker, or bank agent might have readily caught the idea that the plaintiff had in his mind, what he is now contending for; but considering what the circumstances were, I can hardly think that the defendant, though himself a bank agent, if he had seen the letter which the plaintiff wrote to *McDermot* and *Walsh*, would have suspected that the plaintiff had such a thought in his mind, unless it was in some way suggested to him.

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Then as to the fourth point, that the plaintiff had on one occasion refused to endorse because the defendant had not endorsed, and that the defendant being told of this, put his name nevertheless on the note when it was brought to him; it would be unsafe to infer from this any thing more than that the defendant certainly understood from this any thing more than that the plaintiff made a point of seeing that he did not endorse without the defendant.

It has not been suggested, nor do I see how it could be, that whatever note that note was which the plaintiff had so hesitated to endorse, there was any ground on which he could have asked the defendant to assume a

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liability greater or of a different kind in effect from that which he was willing to assume himself; and in regard to the note in question in this suit, we can see after knowing all that the parties have desired to put forward, that there really could be no pretence for imagining that the defendant would have agreed to place himself in such a position as the plaintiff is endeavouring to place him by means of this suit.

We are all very clear that the only question can be whether the plaintiff's bill should be dismissed with costs, or whether the decree, as it stands upon the re-hearing, is more proper; ordering the plaintiff to pay to the defendant the amount of excess above his equal share of liability, which the defendant has been obliged to pay.

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In any event the plaintiff could have no claim in equity on the defendant to pay more of the judgment than the plaintiff himself is bound to pay. If all had continued solvent, each of these parties could only as between themselves have been made to bear his equal fourth part of the judgment debt.

We can hardly, I think, come to the conclusion upon the evidence, that the plaintiff and defendant together, and by themselves, came on the 25th of June, 1856, or at any other time, under a joint engagement to pay the note. I mean what can be either in law or equity treated as a joint engagement. Upon the note they became severally liable as separate endorsers, and the evidence hardly enables a court of equity, I think, to say that looking beyond or out of the note they can see a joint undertaking of the two to pay this debt to the bank. If not then, each can only be held liable for half of the whole on another ground here, that of contribution to a joint debt. It may be that the evidence of the insolvency of the other two members of the firm is sufficient to enable us to say that these two members

of it are necessarily left to pay the whole debt, and that as one cannot be held liable as between themselves to pay more than the other, the court may in the actual state of affairs decree that what is right shall be done, namely, that the plaintiff and defendant shall each pay half of a debt which has fallen upon the two exclusively.

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ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

DICKSON v. WARD.

Practice—Issues of fact and law—Error while issue in fact undisposed of.

The plaintiffs demurred to one plea pleaded, and took issue on another; and the demurrer, on argument, having been overruled, the plaintiffs entered judgment against the demurrer, and before the issue in fact was tried brought error which was quashed, on the ground that until the issue in fact was disposed of, error could not be sustained.

This was an appeal from a judgment of the Court of Queen's Bench, on a demurrer to the defendant's second plea in a cause in that court, wherein the appellants were plaintiffs and the respondents were defendants, the declaration, pleadings, and proceedings, in which were as follows:— Statement.

The 25th day of March, 1857. *Charles Thompson*, by *Hector Cameron*, his attorney, sues *E. B. Ward*, who has been summoned by virtue of a writ, issued on the 12th of March, 1857.

For that the defendant, having no reasonable or probable cause for believing that the plaintiff was indebted to him in the sum of twelve thousand dollars, and the plaintiff not then being indebted to the defendant in the said sum of money, or in any other sum, maliciously caused a certain steamboat called the *Kaloolah*, then being the property of plaintiff, to be seized and attached by virtue of an attachment maliciously issued from the District Court of the United States of America, for the district of Michigan, by and at the instance of the defendant, to answer the said supposed claim or demand of the defendant against the

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plaintiff for the sum of twelve thousand dollars; which said sum was not then, nor was any part of it, due or owing by the plaintiff to the defendant; and the plaintiff avers that the suit or libel of the defendant against the plaintiff in the said court, in respect of the said supposed claim or demand of the defendant against the plaintiff, has been dismissed with costs by the said court, and the said suit is now determined in favour of the plaintiff. By reason of which wrongful and malicious seizure the plaintiff was obliged to expend and did expend a large sum of money in and about procuring the release of the said steamboat, called the *Kaloolah*, and for a long space of time lost and was deprived of the use thereof, and of large gains which he otherwise would have derived therefrom.

And the plaintiff claims three thousand pounds.

The first day of April, in the year of our Lord one thousand eight hundred and fifty-seven.

Statement.

The defendant, by *John Roaf*, the younger, his attorney, says that he is not guilty.

The thirtieth day of December, in the year of our Lord one thousand eight hundred and fifty-seven.

And the plaintiff joins issue on the defendant's plea.

And for a further plea the defendant says that, after the libel of the defendant against the plaintiff had been dismissed in the said District Court of the United States of America for the district of Michigan, as in the declaration is alleged, and before the commencement of this action, to wit, on the ninth day of March, in the year of our Lord one thousand eight hundred and fifty-seven, the defendant prosecuted an appeal against the decision of the said District Court, to the Circuit Court of the state of Michigan, as by the law he was permitted to do; and at the time of the commencement of this action the said appeal was still pending and undecided in the said Circuit Court.

And the defendant avers, that at the time of the commencement of this action the said suit of the defendant against the plaintiff was not, nor is it now, fully determined against the said defendant.

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And *George Penny Dickson* and *John Coleman Griffith* suggest, and give the court here to understand and be informed, that after the said *Charles Thompson* declared as aforesaid, the said *Charles Thompson* died, and that they, the said *George Penny Dickson* and *John Coleman Griffith*, are the executors of his last will and testament.

The thirtieth day of August, in the year of our Lord 1859.

The plaintiffs say that the plea of the defendant by him lastly pleaded is bad in substance.

The ground of demurrer is, that the fact of the appeal in the said plea set forth having been prosecuted as therein alleged does not affect the plaintiffs' right of action in this cause.

The second day of September, in the year of our Lord 1859.

Statement.

The defendant says that the plea to which the plaintiffs have demurred in this action is good in substance.

And hereupon, on the twentieth of September, in the year of our Lord 1859, come the parties aforesaid, by their respective attorneys aforesaid, and it appears to the court here that the said plea is good in substance.

Therefore it is considered, &c.

The twenty-fifth day of February, in the year of our Lord 1863.

The plaintiffs say that there is error in the above record and proceedings, and the defendant says there is no error therein.

The opinion of the court below having been delivered by Sir J. B. ROBINSON, C. J., as follows:

We have found no case decided, nor any discussion upon the question, whether, when a person indicted for an offence, or arrested in a civil suit, has been acquitted upon his trial, he can sustain an action for the malicious

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prosecution, or malicious arrest, relying upon such acquittal as "a legal determination" of the proceeding against him, although an appeal from the judgment in his favour is at the time pending undetermined in a higher tribunal.

Upon principle, our opinion is, that till the appeal has been determined the party is not in a situation to bring his action for a malicious prosecution or arrest, or, as happens to be the case here, for maliciously suing out an attachment against his property; for in such a case the original cause cannot be said to be at an end, and that repugnancy and inconvenience may occur, which has led to the establishment of the rule, that the original cause must be shewn to have been disposed of.

It would be manifestly absurd and inconsistent if the plaintiffs should be allowed to proceed in this action and recover, on the ground that the steamboat in question had been maliciously seized and detained, without any reasonable or probable cause, and it should be afterwards determined upon the appeal, which was pending before and at the time this action was brought (for that is what the plea states,) that the defendant had a good cause for seizing and detaining the vessel.

Statement.

It certainly seems to be entirely inconsistent with the language of the court in *Fisher* v. *Bristow*, (*a*) that this action should be suffered to be brought and proceeded in while the appeal is pending. We refer also to Bac. Abr. "Action on the case," H., note; *Robins* v. *Robins*, (*b*) *Chitty* on Pleading, vol. ii., p. 486, note y, *Mellor* v. *Baddeley*, (*c*) *Skinner* v. *Gunton*, (*d*) *Yeaton* v. *The United States*, (*e*) *Burton* v. *Place*. (*f*)*

The plaintiffs appealed therefrom, alleging as a

(*a*) Doug. 215.
(*b*) 1 Salk. 15.
(*c*) 2 Cr. & M. 675.
(*d*) 1 Saund. 228, a.
(*e*) 5 Cranch, 281.
(*f*) 4 Wend. 581.

*But see Scott v. Pilkington, 2 B. & S., where it was held in an action on a foreign judgment that pendency of an appeal in the foreign court against such judgment is no bar to the action, although it may afford ground for the equitable interposition of the English court in which the action is brought to prevent the possible abuse of its process, and on proper terms to stay execution.—S. C. 8 Jur. N. S. 557.

ground of appeal, that the second plea of the defendant (being that to which the plaintiffs have demurred) is bad in substance, and that the demurrer thereto ought to have been sustained and allowed. 1863. Dickson v. Ward.

No reasons were assigned by the respondent in support of the judgment.

On the appeal being called on for argument

Mr. *Anderson*, for the respondent, objected that the record was incomplete, there being an issue of fact yet undisposed of. That the judgment on the demurrer, which was against the plaintiffs, had been entered by them, and defendant knew nothing of the proceeding.

Mr. *Eccles*, Q. C., and Mr. *Hector Cameron*, for the appellants.

Defendants, under the pleadings, had a right to enter judgment on the record, and are entitled to final judgment on the record on getting judgment on the demurrer to a plea that the action on the foreign judgment was not at an end. This is not a writ of error, but an appeal which is given by the act (Con. Stat. U. C., ch. 13, sec. 9) from *all judgments*. Statement.

They referred to 1 Saunders n. 1, p. 80; *Beekham* v. *Knight*, (*a*) *Carden* v. *The Cemetery Company*, (*b*) *Hinton* v. *Acraman*. (*c*)

Mr. *Anderson*.—The provisions of the Consolidated Statutes are transcripts of the English Common Law Procedure Act. Two classes of cases are created by them—1st, error; 2nd, appeal. This must be error; if not error, it is nothing; and before there can be a writ of error on the issue in law, the issues in fact must be disposed of.

(*a*) 7 Dowl. 409. (*b*) 7 Dowl. 425.
(*c*) 8 C. B. 737.

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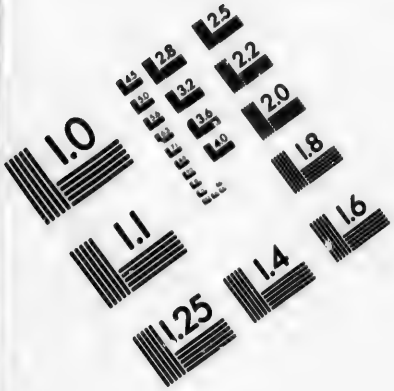

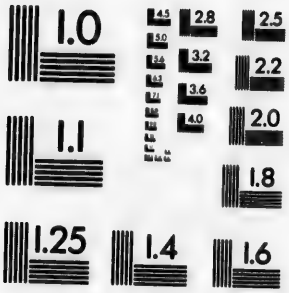

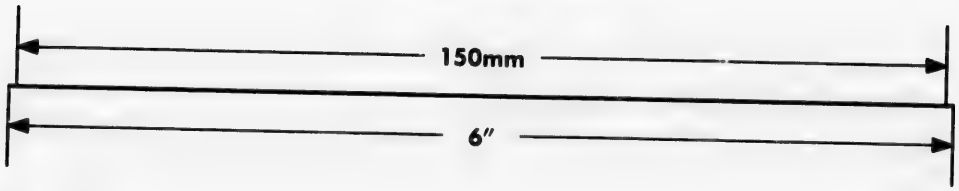

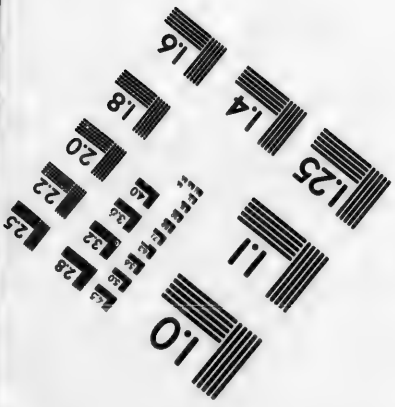

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Counsel also argued the question on the demurrer, but as the judgment of the court is given exclusively on the preliminary objection, it is unnecessary to state the authorities cited.

After taking time to look into the authorities

DRAPER, C. J.—In this case the respondent has raised a preliminary objection to the appeal being heard, namely, that from the appeal book it appears that the respondent has pleaded not guilty, as well as the special plea on which the Court of Queen's Bench has given judgment for him, and that the issue in fact upon the plea of not guilty is not shewn to have been tried, nor any judgment to have been given on it, and so the record is incomplete and not in a state in which this court can give judgment upon it.

Judgment.

It has been argued for the appellants that by the 9th section of the Consolidated Statutes respecting the Court of Error and Appeal, an appeal lies to this court from all "judgments" of the Court of Queen's Bench or Common Pleas, and that the judgment rendered against the appellants on their demurrer to the second plea having been entered, the right to appeal exists although the issue in fact is not disposed of, and that this court will assume if necessary that it is entered on the whole record.

The respondent's counsel asserts (and asks for an opportunity to prove) that the judgment has been entered by the appellant without the respondent's knowledge or consent, and that he had no notice of it until he was notified that this appeal was set down for hearing, and that the judgment is entered only on the demurrer.

On enquiry, we find that no transcript has reached the clerk of this court, as required by the 41st section of the statute, though that section only authorises the

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cause to be set down for argument after such transmission. If we felt it necessary to rest our decision on the alleged fact (if true) that the appellants had entered the judgment without the knowledge or concurrence of the respondent, which apparently would be irregular, (see *Hinton* v. *Acraman*,) we should have given an opportunity for ascertaining and establishing the facts. But the absence of the transcript is probably by itself a sufficient ground for dismissing the appeal, and if that objection be waived, we have only before us the printed appeal books, from which we cannot gather that the issue in fact has ever been tried, and which does not in terms directly shew for whom the judgment was given. The suggestion and denial of error is a matter necessarily subsequent to the judgment, and it is only from these we can infer what the judgment was. The case of *Tolson* v. *Kaye* (*a*) is a clear authority that the judgment below is incomplete so long as judgment upon any issues in fact is not given, though judgment *quod eat inde sine die* had been given for defendant on demurrer; and the court in that case, after hearing the principal questions argued, quashed the writ of error for that incompleteness. The 10th section of our statute gives to this court a similar power. As to the contention, that the appellants may appeal against "any judgment," and therefore against this judgment on part of the record, we think it sufficient to say that the statute provides for two classes of cases which may be brought before the court; the one in the nature of appeal, and embraced by sections 22 to 28 inclusive; the other in the nature of a writ of error provided for by the 30th section, which expressly enacts that "no other appeal from a decision of the Court of Queen's Bench or Common Pleas shall be allowed, unless the judgment decision or other matter appealed against appears of record." Coupling this with the 10th section, we think that the legislature intend appeals contemplated by the 30th

Judgment.

(*a*) 6 M. & G. 536.

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section to be on the same footing as cases formerly brought up on writ of error, and that the record must be complete before such appeal will lie. We have acted on this view of the statute and practice in former cases, and we therefore quash this appeal with costs.

THE WISCONSIN MARINE AND FIRE INSURANCE COMPANY BANK v. THE BANK OF BRITISH NORTH AMERICA.

Bill of Exchange—Bill of Lading—Duty of Agent.

A bill of exchange was sent by a banking institution in the United States to a bank in Toronto for "collection and remittance," &c., accompanying which was a bill of lading for 10,000 bushels of wheat, which, on the bill of exchange being accepted by the drawees was delivered over to them, they being the consignees named in such bill of lading. *Held*, affirming the judgment of the court below, that it was not the duty of the bank here as the agent of such foreign bank in the absence of special instructions to retain the bill of lading until the bill of exchange was paid.

Statement

This was an appeal from the judgment of the Court of Queen's Bench, as reported in the 21st volume of the reports of that court, at page 284, where the facts out of which the action arose as also the pleadings in that action are fully set forth.

From that judgment the plaintiffs appealed, alleging that the judgment was not according to law, and that on the facts as they appear in judgment the rule *nisi* for a new trial thereby refused should have been made absolute.

Mr. *Hector Cameron* for the appellants.

Mr. *Eccles*, Q. C., and Mr. *Galt*, Q. C., for the respondents.

In addition to the cases cited in the court below, *Wood* v. *Theidman*, (*a*) *Cumming* v. *Shand*, (*b*) *Smith* v. *Virtue*, (*c*) *Brown* v. *Hare*, (*d*) *Wright* v. *London Dock Company*, (*e*) *Hoare* v. *Dresser*, (*f*) *Schuster* v.

(*a*) 10 W. R. 856.
(*b*) 5 H. & N. 95.
(*c*) 9 W. R. 146.
(*d*) 4 H. & N. 822.
(*e*) 5 Jur. N. S. 1411.
(*f*) 5 Jur. N. S. 371.

McKeller, (*a*) *Wingate* v. *The Mechanics' Bank*. (*b*) *Opie* v. *Serrill*, (*c*) *Smith* v. *Lascelles*, (*d*) *Van Casteel* v. *Booker*, (*e*) *Mitchell* v. *Ede*, (*f*) *Story* on Bailments, sec. 137, *Story* on Agency, secs. 52, 82, 84, were referred to and commented on by counsel.

After looking into the authorities

VANKOUGHNET, C.—Three material allegations are contained in the plaintiffs' declaration. 1st. That the plaintiffs delivered to *Cassels* as agent of the defendants the bill of lading in the pleadings mentioned, to hold the same and the property therein mentioned (being a cargo of wheat) as security for the due payment of a certain bill of exchange, also in the pleadings mentioned, and by the plaintiffs transmitted to the defendants for collection. 2nd. That the defendants, contrary to their engagement and duty in that behalf, delivered the bill of lading to *Clarkson, Hunter & Co.*, upon whom the bill of exchange was drawn, and who upon accepting it received the bill of lading from the defendants. 3rd. That by means of the bill of lading, *Clarkson, Hunter & Co.* obtained the possession of the wheat. We are of opinion that these allegations are not sustained in proof, and that the plaintiffs' action therefore fails. There was no evidence whatever of any instructions to the defendants to hold the bill of lading and the property covered by it till the bill of exchange was paid. The wheat was never in the possession of the plaintiffs or defendants, nor was there any instruction or request from the plaintiffs to the defendants to take the wheat out of the possession of the shippers, whose agents, *Clarkson, Hunter & Co.*, received it in Toronto on its arrival there. The plaintiffs when they received the bill of lading knew in whose custody the wheat was, and to whose custody it was going, and they by no act of their own, either by instruction to the defendants or otherwise, interfered with this

Judgment.

(*a*) 7 Ell. & B. 704.
(*b*) 10 Barr, 104.
(*c*) 6 Watts & Sergt. 264.
(*d*) 2 T. R. 187.
(*e*) 2 Ex. 691.
(*f*) 11 A. & G. 888.

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custody. The wheat in question was out of the possession of the shippers; for *Clarkson, Hunter & Co.* were only their agents here to receive it, according to the terms of the bill of lading, and it is proved that they obtained the delivery of it without producing or using the bill of lading, and without reference to it. The defendants received no instructions how to deal with the bill of lading, and it was not unreasonable for them to think that it was to be handed to the party who accepted the bill of exchange. They had no information about the wheat, and were not told to take any action in regard to it. As it left Milwaukee, so it reached and remained in Toronto in the possession of the shippers and their agents.

It might be more prudent for a bank to apply for and receive precise instructions how to deal with such an evidence of title to property, as a bill of lading when it is transmitted to them without any instructions at all.

Judgment.

As banks here may themselves become the assignees and holders of bills of lading, and thus become entitled to the property covered by them, so also I suppose they may become agents to deal with them for others who transmit such instruments to be held in security for payment of an accompanying bill of exchange, and these may be transmitted under such circumstances as will render it necessary for a bank receiving them to act with great caution in dealing with them, that they may avoid any liability.

The other members of the court concurred.

Per Curiam.—Appeal dismissed with costs.

[*Before the Hon. Arch. McLean, Ex-C. J., President, the Hon. W. H. Draper, C. B., Chief Justice of Upper Canada, the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. B. Richards, Chief Justice of the Common Pleas, the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Morrison, and the Hon. Mr. Justice John Wilson.*] 1864.

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

THE GREAT WESTERN RAILWAY COMPANY, APPELLANTS, AND THE COMMERCIAL BANK OF CANADA, RESPONDENTS.

Corporations—Corporate seal—Ultra vires—Misdirection—Non-direction—New trial—Evidence—Res gestae.

In an action for money lent, brought by the Commercial Bank of Canada against the Great Western Railway Company of Canada, it appeared that the amount set forth in the particulars, being the sum of $942,672 03, was advanced by the bank on the credit of the Great Western Railway Company, and expended by Messrs. *Brydges* and *Reynolds*, the managing and financial directors respectively of the Great Western Railway Company, on the completion and equipment of the Detroit and Milwaukee Railway, which came under the control of the directors of the Great Western Railway Company. Digest.

At a general meeting of the proprietors of the Great Western Railway Company held in London on the 1st of October, 1857, and in Canada on the 2nd of November following, it was resolved to advance £150,000 sterling to the Detroit and Milwaukee Company, the expenditure being under the control of the Great Western Company; and at another general meeting of the proprietors of the Great Western Company held in London on the 7th of October, and in Canada on the 2nd of November, 1858, it was resolved to advance the further sum of £100,000 to the Detroit and Milwaukee Company, such advance also "*to be expended by and under the control of the Great Western Directors.*" On the sixteenth day of August, 1858, the statute 22 Victoria, chapter 116, was passed, and by section 11, the Great Western Company was authorised "*to use its funds by way of loan or otherwise, in providing proper connections and in promoting its traffic with railways in the United States of America;*" such expenditure, it was provided, should be authorised by a two-thirds vote of the shareholders at a general meeting; and by that section it was further enacted, "*that the loan of* $750,000 *already made by the said Company to the Detroit and Milwaukee Railway Company is hereby declared to be lawful.*" It appeared that Messrs. *Brydges* and *Reynolds* stipulated with the bank to discharge all advances made by it from time to time on the account in question, by sterling bills of exchange on the Great Western Railway Company, London, or from the traffic receipts of the Detroit and Milwaukee Railway under their control, and credits appeared in the particulars for £88,620 16s. 7d. of sterling exchange (equal to about $415,000) drawn under this stipulation. At the trial, a nonsuit was moved for upon the grounds, amongst others, that these dealings were *ultra vires* of the Great Western Company; that *Brydges* and *Reynolds* had no authority to bind the company; and that there was

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no corporate seal to make defendants liable. Leave was reserved to move the court in *banc* thereon, and after evidence for the defence, the learned judge (*Burns*, J.) left the following questions to the jury: *Firstly*—To which company was the credit given by the bank, to the Great Western or to the Detroit and Milwaukee? or was the credit given upon the responsibility of Messrs. *Brydges* and *Reynolds* irrespective of either Company?

Secondly—Had Messrs. *Brydges* and *Reynolds* authority from the Great Western Railway Company to make financial arrangements for the Detroit and Milwaukee Company on account of the Great Western Railway Company to the extent of £250,000 sterling, agreed to be loaned by the Great Western Company to the Detroit and Milwaukee Company? And was the account of the Commercial Bank opened and conducted by them in pursuance of such authority?

Thirdly—Had the Commercial Bank notice at any time, while the account was going on, that Messrs. *Brydges* and *Reynolds* had exceeded their authority, or that more than the two loans, amounting to £250,000, had been expended?

Fourthly—Suppose the original credit was given by the bank to the Great Western Railway Company on the opening of the account, was there any understood limitation between the parties as to the question of liability at the time the letter of the 16th of December, 1858, was given, either to the extent of the second loan of £100,000 sterling or otherwise? or was the account continued on after that period in the same manner as before by the parties?

Fifthly and lastly—Did the Great Western Company, by its dealings with the Detroit and Milwaukee Company, reap the benefit of the expenditure made by the Commercial Bank on the Detroit and Milwaukee account?

The jury returned the following answers to the questions submitted:

Digest.

First—To the Great Western.

Second—They had the authority; and the account was opened and conducted by them in pursuance of that authority.

Third—The bank had no notice that Messrs. *Brydges* and *Reynolds* exceeded their authority.

Fourth—There was no limitation, and the account was continued in the same manner as before the letter of the 16th December, 1858, was given.

Fifth—They did.

A verdict was accordingly entered for the bank, the amount to be ascertained by a referee to be agreed on between the parties, who by an endorsement on the record was to have power to report upon the different classes of the account, and to submit a statement for the opinion of the court. A rule *nisi* was obtained by the Great Western Company in the Court of Queen's Bench to enter a nonsuit, and also to set aside the verdict for misdirection and for non-direction; and for the reception of improper evidence as specially set forth in the rule. The Court of Queen's Bench discharged that rule, and on leave given an appeal was brought from that decision. *Held*, on appeal, that the nonsuit was properly refused; and that the bank was entitled to recover to the extent of so much of the two loans of £150,000 and £100,000 sterling respectively, as had not been drawn for; (*Vankoughnet*, C., *dubitante*, as to latter loan;) that the Court of Queen's Bench should have so declared the liability of the Great Western Company to the bank, and that not having done this there should be a new trial, unless the parties settled upon this footing or ascertained the amount by a reference: (*McLean*, President, dissenting:) the court being reminded that the parties at the trial had agreed to a reference of the amount, on consultation, ultimately ruled that if a new trial was desired by the bank it should be without costs; if by the company then with costs:

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but if both parties consented, the case should be remitted to the arbitrator to ascertain the amount due in accordance with the opinion of the court. If not agreed to by the 1st of April following, then a new trial was ordered with costs, to be paid by the appellants, the Great Western Company.

On the trial of the action it was shewn that Messrs. *Brydges* and *Reynolds*, as such managing and financial directors, had written to the bank asking for a credit of $100,000 on their D. & M. account, which, on the 1st of April, 1858, was brought before and considered by the directors of the bank at a meeting of the board held on that day, and on the same day their cashier wrote accepting the proposal of Messrs. *Brydges* and *Reynolds*. *Held*, (affirming the judgment of the court below,) that the minutes of the board were properly admissible as evidence, as part of the *res gestae*. It was also shewn that the agent of the bank at Hamilton had sent to the head office a statement shewing how the account at his office with the Great Western Company was kept. *Held*, (also affirming the judgment of the court below,) that such statement was admissible as evidence in the cause.

This was an appeal from a judgment of the Court of Queen's Bench, as reported in the 22 volume of the reports of that court at page 233, where the facts of the case are clearly stated.

From the judgment there reported the Great Western Railway Company appealed assigning as reasons against such judgment:

Statement.

First.—The *rule nisi* for a nonsuit should have been made absolute on the grounds amongst others:

1st.—The action being indebitatus assumpsit on the common counts for money lent, money paid, for interest upon and for the forbearance at interest of moneys due from the appellants to the respondents; for work and labour, and for money found to be due from the appellants to the respondents on an account stated between them, there was no evidence to sustain such action or that should have been submitted to the jury.

2nd.—The evidence showed that the moneys advanced or paid by the respondents constituting the cause of action, were advanced and paid for the purposes of the Detroit and Milwaukee Railway Company, and if advanced upon the credit of the appellants would not be binding on them, such application of the money being *ultra vires* of the appellants' charter and illegal, and the respondents having been aiders and abettors in this improper and illegal application of the moneys cannot

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recover the same to the prejudice of the stockholders of the appellants' company.

3rd.—The act 22 Victoria, chapter 116, having only empowered the appellants to *lend their funds* in providing proper connections and in promoting their traffic with railways in the United States, when sanctioned by a vote of two-thirds of the shareholders voting in person or by proxy at a general meeting of the stockholders specially called for the purpose, and the moneys advanced by the respondents and sought to be recovered in the said action being in excess of any loan or loans authorised by the shareholders to the extent of a million of dollars, and not having been applied in providing proper connections or in promoting the traffic of the appellants with other railways in the United States, but in paying the debts of the Detroit and Milwaukee Railway Company due upon their bonds, coupons, notes and acceptances in many instances held by the respondents themselves, do not furnish a cause of action against the appellants.

Statement.

4th.—The appellants being authorised by their charter, a public act of parliament, to borrow moneys only by bond or debenture under their corporate seal, and the money sought to be recovered not being so borrowed, there was no legal evidence of the borrowing for the consideration of the jury.

5th.—The transactions out of which the respondents' alleged causes of action arose being out of the usual scope and powers of the appellants, could not be binding on the appellants without being sanctioned under their corporate seal, and the evidence shewed they were not so sanctioned.

6th.—The said judgment erroneously determines that a power to lend gives power to borrow.

7th.—The evidence established that the payments and advances made by the respondents, forming their cause of action in the said action, were made upon cheques drawn by *Charles J. Brydges* and *Thomas Reynolds* in their individual characters, without any official designation whatever from the commencement of the account in December, 1857, till the month of Janu-

ary, 1859, and from January, 1859, until the close of the account on cheques drawn by the said *Brydges* and *Reynolds* in their official character of President and Vice-President of the Detroit and Milwaukee Railway Company—and countersigned by the Secretary and Accountant of the said Company—that the moneys so drawn were applied to the purposes of the said Detroit and Milwaukee Railway Company, and that the said *Brydges* and *Reynolds* were, during the whole time the said advances and payments were being made, respectively President and Vice-President of the said Detroit and Milwaukee Railway Company, which was and is a distinct foreign corporation, except at the time of the advance of the first sum of $10,000, on the 30th December, 1857, and the sum of $19,000 on the 18th of January, 1858, which two sums were re-paid and satisfied by bills of exchange drawn by the said *Brydges* and *Reynolds* on England, and credited in the same account on the first day of February, 1858, and which bills were drawn for the express purpose of covering the said two advances. That the said advances were charged to an account into which the traffic earnings and other moneys of the Detroit and Milwaukee Railway Company were carried, and against which the Detroit and Milwaukee Railway Company had a right to draw, and for moneys advanced upon such cheques the appellants could not be legally held responsible as primary or principal debtors. Statement.

8th.—The particulars of the claim of the respondents, put in evidence, shew that all advances made by the respondents previous to those made on the Detroit and Milwaukee Railway Company's cheques and notes were re-paid.

9th.—The letter of the 16th December, 1858, written by Messrs. *Brydges* and *Reynolds* to *William H. Park*, the respondents' manager at Hamilton, and put in evidence at the trial by the respondents, in terms recognised the Detroit and Milwaukee Railway Company as principal debtors, and the cheques and other documentary evidence showing that the said company was treated by the respondents as a debtor, and the moneys advanced having been applied to the uses of that company, it was not competent to the respondents to shew by parol testimony as against the appellants, a corporation, that the Detroit and Milwaukee Railway Company were not principal debtors.

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10th.—Assuming that the directors of the appellants' company could overdraw the company's bank account and make the company liable for the overdraught, they could not do so by cheques drawn in their individual names, or by cheques in which they describe themselves as officers of another incorporated company, or by any other means than the recognised method of the company in drawing upon their bankers, and without shewing upon the face of their cheques that they assumed to bind the appellants and were drawing upon their bank account —nor could any number less than a majority of the directors bind the company by any unusual description of cheque or method of drawing—and the evidence showing that Messrs. *Brydges* and *Reynolds* were not authorised by the appellants to draw cheques either in their own name or in the name of the Detroit and Milwaukee Railway Company upon the bank account of the appellants, cheques so drawn and moneys advanced thereon could not be legally charged by the respondents to the appellants.

Statement.

11th.—Messrs. *Brydges* and *Reynolds* could not legally enter into a contract or engagement with the respondents to open an account for the transaction of the business of another company, nor to obtain credit for another company, nor for the appellants' company, beyond that already in existence and recognised by the respondents and appellants.

12th.—The overdrawing credit agreed upon by and between the respective Boards of Directors of the appellants and respondents, was established by the evidence to be $200,000, and this limit could not be exceeded or varied so as to bind the appellants, except under the same authority that contracted and agreed for the credit —and no authority for a change in the credit was shown on the trial, but on the contrary, that no such authority was given, was established.

13th.—The evidence shows that in so far as the agreement for opening the account in question was made with intent to bind the appellants, the same was planned for the purpose of enabling the agents of the appellants to keep it off the books of the appellants, and the respondents did, in pursuance of such agreement, describe the account in the pass book and in their correspondence as

an account with the Detroit and Milwaukee Railway Company, and thus prevented the appellants from exercising that control over it which they could and would have exercised if the account had been described as one with the appellants. The respondents therefore ought not to be allowed to put the appellants to the loss resulting from such a dealing. 1864. Gt. Western Railway Co. v. Commercial Bank.

And secondly—The said rule *nisi* as to the branch thereof, asking for a new trial, should have been made absolute for the reasons above set forth, and on the grounds specifically set out in said rule *nisi*.

And further because the said judgment of the Court of Queen's Bench is erroneous and should be reversed—for deciding that the borrowing powers of the appellants, a railway corporation, are analogous to, and co-extensive with, those of joint-stock banking companies—whereas, in fact and in law, the said appellants have no borrowing powers, except those expressly contained in their acts of incorporation, and the several acts amending the same—none of which authorise a borrowing except by bond or debenture, for purposes specified in the acts—and for none of which purposes were the moneys sought to be recovered in the said action, advanced or used, of which the respondents before and at the time of making such advances had notice. Statement.

Also—For assuming that the English section of the Board of Directors of the appellants had any power or authority under the act 22 Victoria, chapter 116, section 12, to make or authorise Messrs. *Brydges* and *Reynolds* to make the arrangements under which the respondents based their demand in the said action—and in assuming that the said section of the English Board of Directors, assuming that they had power so to do, did in fact authorise Messrs. *Brydges* and *Reynolds* to open an account with the respondents for the purposes of the Detroit and Milwaukee Railway Company—there being no evidence of such authorisation.

Also—In assuming and determining that the respondents' claim was for a balance on an overdrawn bank account—properly so called—whereas in law and in fact it is and was for moneys advanced upon a contract entered into with Messrs. *Brydges* and *Reynolds*

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Also—In assuming against all the evidence that the appellants as a company were aware of the advances being made, and had by laches, in not interfering to prevent the same, precluded themselves from objecting thereto, or in assuming that the knowledge of Messrs *Brydges* and *Reynolds* the chief officers of the company receiving the benefit of the advances being directors of the appellants was notice to the appellants.

Also—In determining that advances by the respondents to assist the Detroit and Milwaukee Railway Company beyond what was authorised by the legislature and the vote of the shareholders was not for a purpose that was illegal, and that advances so made were recoverable against the appellants.

Also—In determining that power to the appellants to use their funds for the purposes of a foreign company gave them authority to borrow moneys, to be so used and in a manner different from the regular and authorised mode of borrowing, that in fact power to lend gives power to borrow in order to lend.

Statement.

Also—In assuming that the fact that several directors of the appellants were also directors of the Detroit and Milwaukee Railway Compay made the latter company less a distinct and independent corporation than it would have been if the direction were entirely different, and the acts of its officers as far as the respondents were affected thereby necessitating the acts of the appellants —and the appellants responsible therefor, although the said officers in so acting assumed to be acting for the said Detroit and Milwaukee Company.

Also—In determining that whether the Detroit and Milwaukee Railway Company were liable to the respondents or not, for the moneys advanced and applied for the purposes of that company, the appellants were liable —thus in effect determining under the evidence that two distinct corporations, not jointly contracting, could be liable at one and the same time as principal debtors for the same debt.

Also—In determining in effect that a parol undertak-

ing of Messrs. *Brydges* and *Reynolds* to provide exchange on England to cover any advances made by the respondents to the Detroit and Milwaukee Railway Company, or to the appellants on account of that company, would be obligatory upon the appellants—and also, that an undertaking of Messrs. *Brydges* and *Reynolds*, as officers of the appellants, to pay to respondents the earnings of a foreign railway company would be binding upon the appellants—whereas no obligation in law would rest upon the appellants to perform either of the said undertakings, the same being beyond the scope and power of Messrs. *Brydges* and *Reynolds* as directors or agents of the appellants' company. 1864. Gt. Western Railway Co. v. Commercial Bank.

Also—In this that it is assumed by the said judgment that the appellants admit they could not dispute that they would have been liable for exchange drawn by Messrs. *Brydges* and *Reynolds* on the directors of the company in England on account of the loan to the Detroit and Milwaukee Railway Company, whereas no such admsssion has been made, and the case neither requires it to be admitted nor disputed, that the appellants would have been so liable, but in law and in fact they would not have been so liable—and in so far as any conclusion imposing a liability on the appellants is drawn from the said supposed admission, the same is erroneous, and not supported by any premises. Statement.

And also—In legalising and confirming the admission of illegal and improper evidence on the trial of the said cause, as specifically pointed out in the rule *nisi* for a new trial.

In support of the judgment of the court below, the respondents stated and set forth the following answers to the grounds and reasons of appeal.

Answer to first reason assigned:

There was abundant evidence deduced at the trial of this case to sustain the action of the respondents against the appellants, and this was properly submitted for the determination of the jury.

Answers to second reason assigned:

1.—The objection taken on the second reason of the

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appellants is not open to them on the present appeal, inasmuch as such objection was not taken in the rule *nisi* of the appellants obtained by them in the Court of Queen's Bench, and the appellants are confined in their appeal strictly to the terms of their said rule *nisi*.

2.—If such an objection be open to the appellants, the respondents contend that the moneys advanced by them to the appellants for the purposes alleged, were and are in point of law recoverable from the appellants upon the following grounds (amongst others :)

(*a*) The application of such moneys by the appellants was not *ultra vires* of the appellants' charter and illegal.

(*b*) The respondents had no notice of such alleged improper and illegal application of the said moneys.

(*c*) The respondents were entitled to presume that the application of the said moneys by the appellants was for a proper purpose.

Statement.

(*d*) The appellants having received and used the moneys of the respondents, cannot be allowed to raise an objection of this nature.

(*e*) The principle of *in pari delicto* is not applicable.

(*f*) The appellants, although a corporation, have power and capacity to do wrong, like a natural person, and they may in their contracts and dealings exceed the limits of their charter, and when they do so they cannot claim exemption from liability on the mere ground that they have thus so acted.

(*g*) Further, the appellants as a corporation may have no right to violate their charter, but they have capacity to do so, and to be bound by their acts, when a repudiation of such acts would result in manifest injustice to third parties like the respondents.

(*h*) Further, a corporation is more than agent of the shareholders, it is clothed with the legal title to the

property or funds which represent the capital of the corporation, in trust, however, for the shareholders, who are the beneficial owners, and like other trustees, it is possible for the corporation to deal with its funds and property in a manner and for purposes not authorised by or beyond the limits of the charter of incorporation, and to be bound by such dealings. 1864. Gt. Western Railway Co. v. Commercial Bank.

(*i*) Further, the objection of *ultra vires*, in the proper acceptation of the term, imports not that the appellants as a corporation could not and did not in fact enter upon the unauthorised act, but that they ought not to have entered upon it; and this defence therefore necessarily rests upon the violation of trust or duty toward the shareholders, and is not to be entertained when it would work a greater wrong to third parties—such as the respondents, who have dealt *bona fide* with the corporation, and still less would such a defence be open when the shareholders, by contract or otherwise, have acquiesced in or sanctioned such dealings, or when they have derived the benefit thereof, as in the present case. Statement.

(*k*) The appellants, who have received the consideration and benefit of the alleged unauthorised contract, cannot be allowed to disaffirm it, unless they make restitution or a return of the consideration; and so long as the appellants retain this, it is a rule of common honesty that they should re-pay the moneys advanced to secure this benefit.

(*l*) Further, the objection of *ultra vires* with respect to the dealings of corporations like the appellants, only applies to such as are clearly in excess of their rightful powers, and if any vote or proceeding of the shareholders can make such rightful, then the defendants are entitled to assume that such vote or proceeding was duly had before the dealings in question were entered upon.

(*m*) Further, the statutes relating to the appellants, and particularly the acts 10 Vic., ch. 99, and 22 Vic., ch. 116, give the appellants power, and they are permitted to borrow and expend moneys in con-

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nection with railways in the United States of America, and the mere circumstance that the moneys advanced by the respondents to the appellants were expended by them *for the purposes of the Detroit and Milwaukee Railway Company*, (which is the extent only to which this objection of the appellants goes, and to which they must be confined,) is not sufficient to show any excess of the statutory powers of the appellants.

(*n*) Further, any expenditure of the appellants for the purposes of the Detroit and Milwaukee Railway Company, and coming within the authority of the Statute 22 Vic., ch. 116, is lawful, and within the competency of the appellants as a corporation, equally with the ordinary expenditure of the appellants for any of its purposes; and it is not objected by the appellants that a resolution of the shareholders was any condition precedent to the exercise of this power, and that such objection, if otherwise valid, cannot be raised on this appeal.

Statement.

(*o*) The transaction in question is not illegal in any sense of the maxim *ex turpi causa non oritur actio*, for with reference to that principle, the transaction is judged of by its quality and does not depend on the competency or capacity of the person who may enter upon it: any principle of law applicable to cases coming within that maxim cannot therefore apply to the present.

Answers to third reason assigned:

1.—The third ground on which the appellants rely for a nonsuit was not taken by their rule *nisi* in the Court of Queen's Bench, and the respondents rely on this as an answer to the aforesaid reason of the appellants.

2.—If such an objection be open to the appellants, the respondents shew that it was unnecessary for their recovery in the action in question to establish that the moneys advanced by them to the appellants were within the amount of any loan or loans authorised by the shareholders of the appellants' corporation; or that such moneys were applied in

providing proper connections, or in promoting the traffic of the appellants with the Detroit and Milwaukee Railway Company. 1864. Gt. Western Railway Co. v. Commercial Bank.

3.—The respondents also refer, in connection with this objection of the appellants, to the preceding answers of the respondents, and rely on such of them as are applicable.

4.—Further, that this objection forms no ground of nonsuit, inasmuch as material questions of fact are involved in the consideration thereof, and which questions are solely for the determination of the jury.

5.—Further, that the respondents were not bound to ascertain the extent of any loan or loans authorised by the shareholders of the appellants' corporation; nor whether the same were exceeded by the corporation; nor whether the advances of the respondents were applied by the appellants for the purposes literally or strictly within the resolutions which authorised such loans.

Statement.

6.—Further, that if such a consideration was material in the present action, it was incumbent on the appellants, and the *onus* was on them, to prove the extent of the authorised loans of the shareholders of appellants' corporation, and the application by the appellants of the moneys advanced by the respondents for purposes alleged to be essentially different.

Answers to fourth reason assigned:

1.—This fourth ground of nonsuit was not taken by the appellants by their rule *nisi* in the Court of Queen's Bench, and the appellants are therefore precluded in this appeal from raising any such objection to the respondents' recovery in the said action, and the respondents rely on this as a complete answer to such fourth objection of the appellants.

2.—If, however, such objection of the appellants can now be entertained, the respondents shew that the statutes relating to the appellants, and conferring on them powers for borrowing moneys by bond or

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debentures under their corporate seal, do not preclude the appellants from borrowing otherwise or in any other manner.

3.—Further, that this objection of the appellants cannot prevail when they have actually received, used and derived the benefit of the moneys lent to them by the respondents, and now sought to be recovered back.

Answers to the fifth reason assigned:

1.—This fifth reason or ground of nonsuit was not taken by the appellants in their rule *nisi* in the Court of Queen's Bench, and the appellants cannot therefore be allowed to raise such objection on this appeal.

2.—If such an objection be now open to the appellants, which the respondents deny, then the respondents shew that under the circumstances of the present case there is no ground for the distinction attempted to be herein drawn by the appellants as to matters out of the usual scope and power of the appellants, and therefore requiring to be evidenced by the corporate seal; and that even if there is any such distinction in point of law, which these respondents deny, the principle thereof is not applicable where the consideration has been executed by the respondents and the benefit received by the appellants.

Statement.

Answers to sixth reason assigned:

1.—The appellants were authorised to borrow moneys—*Firstly*, as incidental to the objects of their incorporation and the trading nature of their business; and this is fully apparent from the matters in evidence at the trial of this action. *Secondly*, the statutes relating to the said company, and especially the act 16 Vic., ch. 99, confer expressly or by necessary implication upon the appellants the power to borrow.

2.—Further, the respondents rely on their answers given to preceding reasons, so far as applicable, as a further answer to this ground of nonsuit.

Answers to seventh reason assigned:

1.—The seventh ground of nonsuit was not taken by

the appellants, in their rule *nisi* in the Court of Queen's Bench, and they cannot now rely thereon, and the respondents claim the benefit of this objection. 1864. Gt. Western Railway Co. v. Commercial Bank.

2.—If such ground is now open to the appellants, the respondents shew that the question, who were the primary or principal debtors to the respondents in respect of the moneys sought to be recovered in this action, was purely a question for the jury to determine; and that the circumstances alleged in this seventh reason of the appellants, if such did exist, which the respondents deny, were merely items or pieces of evidence to be submitted to the jury, and were and are not conclusive between the parties, and cannot in any manner form a ground of nonsuit.

Answers to eighth reason assigned:

1.—This eighth ground of nonsuit was not taken by the appellants in their rule *nisi* in the Court of Queen's Bench, and they are now precluded from raising the same, and the respondents rely upon this as a sufficient answer to this reason assigned. Statement.

2.—If such point is now open to the appellants, the respondents show that the alleged circumstances therein stated, even if true, which the respondents deny, afford no ground for nonsuit. That such circumstances would be proper for the jury to consider, if the appellants admitted that the advances in question were originally to the appellants, but that afterwards, and in pursuance of some new arrangement, the advances were to the Detroit and Milwaukee Railway Company upon its own credit; whereas on the contray, there was no evidence to shew that the character of the utterances of the respondents, and set forth in the particulars of their demand, was ever changed from the first opening of the account to the conclusion of it.

Answers to the ninth reason assigned:

1.—This ninth ground of nonsuit was not taken by the

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appellants in their rule *nisi* in the Court of Queen's Bench, and they are therefore precluded from now raising the same, and the respondents rely on this objection as an answer thereto.

2.—If such objection be open to the appellants, the respondents show that it forms no ground of nonsuit. That such letter was not conclusive evidence to shew that the Detroit and Milwaukee Railway Company, and not the appellants, were the principal debtors to the respondents; but on the contrary, the said letter in its terms, and the true construction to be placed thereon, was a confirmation in writing of the direct liability of the appellants to the respondents; and in any view thereof such letter was and is only one of a number of pieces or items of evidence to be submitted to the jury in its determination of the question, who were the principal debtors.

Answers to tenth reason assigned:

Statement.

1.—This tenth ground of nonsuit is not taken by the appellants in their rule *nisi* in the Court of Queen's Bench, and it is not competent for the appellants to rely thereon in this appeal, and the respondents claim the benefit of this objection thereto.

2.—If such reason be now open to the appellants, then the respondents show that the matters therein alleged, even if true, which the respondents deny, cannot form any reasons or grounds of nonsuit; that such matters at the utmost are merely circumstances from which the court or jury might infer a want of authority on the part of Messrs. *Brydges* and *Reynolds*, but any inference of such a nature could be, and was in fact counterbalanced by express evidence of authority to bind the appellants with reference to the transactions in question; moreover, the respondents were not bound to have regard to the form but to the real character of the transaction; and it was to suit the convenience of the appellants that the form of cheque referred to was used in their behalf.

Answers to eleventh reason assigned:

1.—This eleventh reason for a nonsuit is not open to

the appellants, inasmuch as it has not been raised by their rule *nisi* in the Court of Queen's Bench, and the respondents claim the benefit of this objection.

2.—If such reason for a nonsuit be open to the appellants the respondents contend that it forms no ground of nonsuit; it is merely a question of the authority of *Brydges* and *Reynolds* to bind the appellants, and that is a mixed question of law and fact, and proper to be submitted to the jury; and there was sufficient evidence to be submitted.

3.—If the ground taken be, that *Brydges* and *Reynolds* could not legally enter into a contract with the respondents to open an account for the transaction of the business of another company than the appellants, however fully authorised by the appellants in that behalf, this objection is simply then to the effect that the appellants themselves could not have opened such account, and is a repetition of previous reasons for a nonsuit, which the respondents have already fully answered.

Statement.

Answers to twelfth reason assigned:

1.—This twelfth reason for a nonsuit was not raised by the appellants under their rule *nisi* in the Court of Queen's Bench, and it is not now open to them to do so, and the respondents claim the benefit of this objection.

2.—If such ground of nonsuit be open to the appellants, the respondents show that the matters above alleged, if true, which the respondents deny, form no ground of nonsuit; it is merely a question of authority, and proper to be submitted to the jury, and the respondents rely upon their answers to the preceding reasons as also applicable hereto.

Answers to thirteenth reason assigned:

1.—This thirteenth ground of nonsuit is not open to the appellants to raise under their rule *nisi* in the Court of Queen's Bench, and it is not therefore any proper ground or reason of appeal, and the respondents claim the benefit of this objection.

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2.—If such reason be open to the appellants then the respondents show that the said alleged matters, even if true, which the respondents deny, form no ground of nonsuit; such alleged matters form no legal objection to the plaintiffs' recovery herein, and are only proper circumstances to be submitted to the jury in connection with the general questions involved in the present action.

General Answer of respondents to first branch of the appellants' rule which relates to entering a nonsuit.

1.—The respondents show that the appellants are precluded in their appeal from raising or taking any ground of nonsuit which was not taken by the rule *nisi* in the Court of Queen's Bench, and that only such grounds raised by the rule *nisi*, and which are now taken in that behalf, can he urged or relied on in this appeal.

Statement.

2.—The respondents further allege that there is nothing in the reasons assigned by the appellants to show that the Court of Queen's Bench erred or were wrong in law in discharging the said rule *nisi*.

TO SECOND BRANCH OF RULE *NISI*.

Answers to reasons assigned:

1.—The respondents, in answer to the reasons of the appellants, as to that branch of the said rule *nisi* which asks for a new trial submit and insist, that no appeal lies from the Court of Queen's Bench to this honourable court in respect to any of the grounds taken in the aforesaid branch of the said rule *nisi*, and the respondents therefore demand that such appeal be hence dismissed with costs.

2.—The respondents further submit and insist that this appeal under the aforesaid second branch of the said rule *nisi* is upon a matter within the discretion of the court of Queen's Bench, and that no appeal lies thereon, and the respondents therefore demand that said appeal be hence dismissed with costs.

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3.—The respondents further shew that the alleged non-direction and misdirection of the learned judge who tried the said cause, and which is set forth in the said rule *nisi*, were not taken or raised at the trial of this cause; or if such alleged non-direction and misdirection, or any part thereof respectively, were so taken, such objections were so vaguely, ambiguously, and indistinctly raised by the appellants, as not to afford ground for a new trial on that account, and the respondents rely on the omission of the appellants to take or raise such objections at the trial, or the insufficient mode in which any of the same have been raised, as a further answer to the said appeal on this ground.

4.—The respondents also shew that such alleged non-direction and mis-direction would only afford ground for a new trial, if it could be shown by the appellants to have produced a verdict contrary to the weight of evidence deduced at the trial of this cause; whereas, on the contrary, the respondents aver that the verdict rendered, at the trial of this cause was entirely in accordance with the evidence given thereat, and the appellants themselves do not in their said rule *nisi* claim any relief against the said verdict as being against the weight of evidence.

Statement.

5.—And the respondents further shew that relief against the verdict on such alleged non-direction or misdirection, was matter of discretion for the Court of Queen's Bench to determine, and is not matter of appeal which this court can or will entertain.

6.—The respondents further submit and insist that the appellants are confined in this appeal to the grounds set forth in the said rule *nisi*, and that no other ground is now open to them, and further, that only such of the said grounds set forth in the said rule *nisi* can be relied upon in respect of which specific reasons of appeal are now assigned by the appellants.

7.—Without waiving the benefit of this objection, the respondents rely on the matters hereinbefore set forth by them, as well as those in answer to the reasons assigned under the first branch of the rule

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nisi, as a sufficient answer to any reason of appeal assigned by the appellants, or relied on by them in support of the aforesaid second branch of the said rule *nisi*.

8.—Without waiver of any of the aforesaid objections, the respondents rely upon their answers hereinbefore contained as a sufficient answer to so much of the said matters of appeal as relate to the said verdict being contrary to law; and the respondents further insist that such verdict was and is not contrary to the evidence given at the trial, for by reference to such evidence it will fully appear that the respondents ought to have recovered, as in fact they did, upon the said evidence.

9.—(*a*) The respondents insist that the ground of appeal, based on the alleged decision of the Court of Queen's Bench, as to the borrowing powers of the appellants, is not open to the appellants under the second branch of their said rule *nisi*, and they claim the benefit of this objection.

Statement.

(*b*) The respondents further show, if such objection be open to the appellants, that the respondents have sufficiently answered the same in their answer to the sixth reason of appeal under the first branch of the said rule *nisi* of the appellants, and the respondents crave the benefit of such answers the same as if they were here again set forth.

10.—(*a*) The respondents insist that the appellants cannot under the second branch of their said rule *nisi* raise any question as to the power and authority of the English section of the board of directors of appellants' company, and they claim the benefit of this objection.

(*b*) The respondents further aver and shew that the said last mentioned matters referred to as a ground of appeal were not raised or taken by the appellants at the trial of this cause, and that they cannot now rely thereon.

(*c*) The respondents further shew that the matters assigned in the above reason of appeal were solely within the province of the jury to determine upon,

after the proper direction in that behalf in law from the learned judge who tried the said cause, and that the appellants took no objection at the said trial to any directions of the said judge in respect of the aforesaid matters. 1863. Gt. Western Railway Co. v. Commercial Bank.

(*d*) The respondents further aver and shew that there was sufficient legal evidence given at the trial of this cause, to shew that Messrs. *Brydges* and *Reynolds* had authority to open the account in question with the respondents, so as to bind the appellants.

11.—(*a*) The respondents insist that the ground of appeal, based on the assumption by the Court of Queen's Bench, that the respondents' claim was for a balance as an overdrawn bank account, is not open to the appellants under the second branch of said rule *nisi*, and they claim the benefit of this objection.

(*b*) Without waiver of such objection, the respondents shew that the matters set forth in this reason of appeal were not raised or taken by the appellants at the trial of this cause, and that the appellants cannot therefore now rely thereon. Statement.

(*c*) The respondents further shew that the aforesaid matters were only proper for the consideration of the jury, and that the appellants did not object to any ruling of the learned judge at the trial in respect thereof.

(*d*) The respondents further aver as the fact is, that their aforesaid claim was for a balance due on an overdrawn bank account, and that it was so considered equally by the appellants as the respondents at the trial of this cause, and that by a reference to the evidence in this cause this will more fully appear.

12.—(*a*) The respondents insist that the ground of appeal referring to the laches and knowledge of the appellants with reference to the advances in question, is not open to the appellants under the second branch of their said rule *nisi*, and they claim the benefit of this objection.

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(*b*) Without waiver of such objection, the respondents show that the matters set forth in this reason of appeal were not raised or taken by the appellants at the trial of this cause, and that the appellants are therefore now precluded from relying thereon.

(*c*) The respondents further shew that the aforesaid matters were only proper for the consideration of the jury, and that no objection was taken to the verdict in this cause in the Court of Queen's Bench in respect of any of the aforesaid matters.

(*d*) The respondents further aver that the appellants had full notice and knowledge of the advances of the respondents sought to be recovered in the said action; and that the evidence given at the trial of this cause shows this sufficiently as by reference to such evidence will more fully appear.

13.—(*a*) The respondents insist that the ground of appeal relating to the advances of the respondents beyond an alleged amount voted by the shareholders, is not open to the appellants under their said rule *nisi*, and the respondents claim the benefit of this objection.

Statement.

(*b*) Without waiver of such objection, the respondents shew that the matters set forth in this reason of appeal were not raised or taken at the trial of this cause, nor in the Court of Queen's Bench, and that the appellants are therefore now precluded from relying thereon.

14.—(*a*) The respondents insist that the ground of appeal relating to the power of appellants to use their funds for the purposes of a foreign company, is not open to the appellants under their said rule *nisi*, and they claim the benefit of this objection.

(*b*) Without waiver of such objection, the respondents rely, by way of answer, to the aforesaid reason of appellants, on the previous answers of respondents to similar reasons of the said appellants, and they claim the same benefit from such answers as if the matters thereof were now again set forth.

15.—(*a*) The respondents insist that the ground of appeal relating to the circumstance that certain of the directors of the appellants' company were also directors of the Detroit and Milwaukee Railway Company, is not open to the appellants under their said rule *nisi*, and they claim the benefit of this objection.

(*b*) Without waiver thereof, the respondents shew that the matters in the said reason set forth were not raised or taken at the trial of this cause, and that the learned judge who tried the said cause, and the Court of Queen's Bench, did not assume the said matters to be, as erroneously alleged, in the aforesaid reason of the appellants.

16.—(*a*) The respondents insist that the ground of appeal relating to an alleged determination of the Court of Queen's Bench, that the two corporations could be liable as principal debtors, is not open to the appellants under their said rule *nisi*, and the repondents claim the benefit of this objection.

Statement.

(*b*) Without waiver thereof, the respondents shew that the matters set forth in the aforesaid reason were not taken or raised at the trial of this cause as any objection to the respondents' recovery therein.

(*c*) The respondents further shew that it was not so determined by the learned judge who tried this cause at the trial thereof, nor by the Court of Queen's Bench, as is in the aforesaid reason of the appellants erroneously alleged.

17.—(*a*) The respondents insist that the ground of appeal relating to an alleged parol undertaking of *Brydges* and *Reynolds*, to provide exchange on England to cover the advances of respondents, is not open to the appellants under their said rule *nisi*, and the respondents claim the benefit of this objection.

(*b*) Without any waiver of such objection, the respondents shew that the matters set forth in the aforesaid reason were not taken or raised at the trial of this

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cause, and the appellants are precluded from relying thereon.

(c) The respondents further shew that the matters in the said reason alleged were only proper to be submitted to the determination of the jury on the general question of the authority of *Brydges* and *Reynolds* to bind the defendants, under such ruling of the learned judge at the trial as would be proper in that behalf, and that the appellants at the trial of this cause did not object to any ruling of the said judge in that behalf, nor did the appellants raise any objection thereto; and the appellants are now precluded from relying on any of the aforesaid matters as a reason of appeal herein.

18.—(a) The respondents insist that the ground of appeal relating to an alleged assumption by the Court of Queen's Bench, that the appellants would be liable for exchange drawn by *Brydges* and *Reynolds* on England, is not open to the appellants under their said rule *nisi*, and the respondents claim the benefit of this objection.

Statement.

(b) Without waiver thereof, the respondents show that the matters in the aforesaid reason set forth were proper for the consideration of the jury at the trial of this cause, subject to the ruling in that behalf of the learned judge who tried the said cause, and that the appellants at the trial of this cause did not object to any ruling of the said judge in that behalf, nor did the respondents or the appellants require any ruling of the learned judge therein; as upon the general question submitted to the jury, and in issue between the said parties, the question whether the appellants were or were not in point of law liable on the said bills of exchange (as such) was immaterial.

19.—(a) Without waiver of the several objections of the respondents to so much of the said rule *nisi* as seeks a new trial for the admission of illegal and improper evidence, upon the ground that such objections are not the subject of appeal in this honourable court; the respondents further shew that said alleged improper evidence was not sufficiently

objected to at the trial of this cause, and that the appellants did not during the said trial require or desire from the learned judge, who tried the said cause, any specific or express, or any ruling with respect to such evidence.

(*b*) The respondents further show, as the fact is, and will appear by the procedings at the said trial, that the appellants waived and abandoned any objections raised by them to such evidence or the admissibility thereof.

(*c*) The respondents further show that the appellants made use of the said evidence, in the said rule *nisi* alleged to be inadmissible, on their own behalf, and in examining and cross-examining witnesses thereon, and they cannot therefore now object thereto.

(*d*) The respondents further show that the said evidence was proper and admissible, and that any ruling of the learned judge in that behalf was correct in point of law, and that the judgment of the Court of Queen's Bench in that behalf was and is correct and in no respect erroneous, or liable to be reversed by this honourable court. Statment.

The respondents further submit and insist, that the judgment of the court of Queen's Bench upon the said rule *nisi*, that the matter therein contained, and the reasons given by the said court, were and are correct in law, and that the appellants have raised no valid grounds of appeal thereto, and that this appeal should be dismissed with costs.

Mr. *M. C. Cameron*, Q. C., Mr. *Irving*, Q. C., Mr. *Roaf*, and Mr. *Anderson* for the appellants.

Mr. *J. H. Cameron*, Q. C., Mr. *Galt*, Q. C., and Mr. *A. Crooks*, Q. C., for the respondents.

The points relied on by counsel appear sufficiently in the reasons assigned by the parties respectively; and the principal authorities cited appear in the report of the case in the court below.

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VANKOUGHNET, C.—The facts in this case, so far as they are of any importance, are sufficiently set forth in the judgment delivered by my brother *Hagarty* in the court below, and I need now mention only such of them as will render plain the reasons for the decision at which we have arrived. The appellants were incorporated as a company to construct and maintain a railway in Canada. The third section of the act 16 Victoria, chapter 3, relating to the company, after reciting "for the avoidance of doubt," declares and enacts, "that the company have had and shall have power and authority to borrow money from time to time for making and completing, maintaining and working, the railway as they might or may think advisable, and to pledge the lands, tolls, revenues, and other property of the company, for the due payment thereof, and might and may make the bonds or debentures issued by the company for securing the payment of any sums so borrowed, or to be borrowed, convertible into stock of the company on the terms and conditions expressed or to be expressed in such bonds or debentures, or in the by-laws of the company, and might and may insert in any bonds or debentures issued, or to be issued by them, such terms and conditions of any kind whatsoever as they might or may think most for the advantage of the said company." This, with the limitation prescribed by the 4th section of 22 Victoria, chapter 116, is the only provision of law which I can find that authorises the Great Western Railway Company to borrow money; and, as will be seen from it, such borrowing is for the purposes proper of the company. The company conceiving that the Detroit and Milwaukee Railway running through the State of Michigan, and separated by the Detroit River from the extreme western terminus of the Great Western Railway would be an important feeder to it, and a most important connection in its business with the Western States, resolved upon advancing money for the completion of that line of road and its effective working; and, accordingly, at a general

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meeting of the proprietors of the Great Western Railway Company, held in London, England, on the 1st of October, 1857, and at a meeting held at the company's office in Hamilton, Canada, on the 2nd of November, 1857, it was resolved, "That the directors be authorised to advance to the Detroit and Milwaukee Railway Company, such an amount not exceeding £150,000 sterling as may be necessary to ensure the completion of the railway across Michigan in connection with the Great Western Railway of Canada; such advance being made as a temporary loan, and on sufficient security; the expenditure of the same being subject to the control of the Great Western Railway Company." That the Great Western Railway Company had, at the time of the passing of this resolution, no right or power to appropriate their funds to such a loan or to borrow money to effect it, I think, no one will dispute. They were not empowered by the legislature to appropriate any portion of their capital and stock, or funds to sustain a railway or any enterprise in a foreign country or beyond the limits of their own road; and, for the purposes of their railway only, were they authorised to borrow at all. I think also it cannot be doubted that any one contracting with them to advance money to the Detroit and Milwaukee Railway on the strength of such a resolution, or of any guarantee or contract that might have been made under it, could never have held the Great Western Railway Company responsible for such advance if made. Were the subject otherwise open to doubt, I think the statute 22 Victoria, chapter 116, section 11, removes it: for there, all parties, as also the legislature, seem to have considered that an act of parliament was required to legalise the advance which had been made under the resolution referred to. That section is in the following words:

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"And whereas the Great Western Railway Company, in order to form connections with railways in the United States of America, has to lay down its rails out of the province of Canada, and to provide facilities at stations

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and otherwise, for consolidating its traffic; therefore the Great Western Railway Company shall have full power and authority to use its funds, by way of loan or otherwise, in providing proper connections, and in promoting its traffic with railways in the United States of North America, provided that no such expenditure shall be incurred unless sanctioned by a vote to that end of two-thirds of the shareholders voting in person or by proxy at a general meeting of the shareholders specially called for that purpose; provided always, that the power hereby granted shall not be construed so as to prevent any other railway company from using its funds in providing the same connections, and promoting its traffic with railways in the said United States; and provided also, that whenever any other railway company shall desire to make such connections, the said Great Western Railway Company shall be bound to assent to the same on equitable and reasonable terms; and provided further, that the loan of seven hundred and fifty thousand dollars already made by the said Company to the Detroit and Milwaukee Railway Company is hereby declared to be lawful."

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It will be observed that while authority is thus given to *lend* money, no authority is given to *borrow* money for the purpose of lending or otherwise, and this is a most important distinction in my view. It is one thing to authorise a company to lend out of its own funds, but it is quite another thing to enable it to go beyond these and the amount of its authorised capital stock, and encumber the undertaking with a load of debt which may utterly paralyze it and render it worthless to the stockholders and useless to the public, whose interests in such enterprises have a large part in legislative consideration. There are certain trading concerns, incorporated or not incorporated, the nature of whose business assumes, nay even requires, that they shall become borrowers or holders of moneys from others, at interest, or not, as may be agreed upon: and in such cases authority in them to that end is implied. But when a company is authorised to raise among subscribers to its stock a certain sum of money and therewith to

build a road, I am not aware of, nor have we been referred to, any authority which decides that they need not by such subscription to stock procure the necessary funds, but that, without any legislative sanction therefor, they may borrow money for the purpose. If then the company could not without express authority, borrow money to build its own road, could it borrow money to build a road for some one else? The statement of the proposition carries with it the answer. While we must, I think, treat the first loan of £150,000 sterling, to be the loan of $750,000 referred to in the statute of 22 Victoria, and ratified by it, it would not necessarily follow that the borrowing of it from the respondents was thereby justified. We cannot assume that the legislature knew how the loan had been effected, or that it had been obtained otherwise than out of the surplus funds of the company. It has been argued that the powers to borrow given to the company by the statute of 16 Victoria, enable the company to borrow money with which to make the loans authorised by the 11th section of 22 Victoria, chapter 116. In my own opinion this is not so, though I believe some of the members of the court take the contrary view. I think the company were authorised to use only its own funds for these loans, and could not create such funds by borrowing them. But, however this may be, we think the fair way to deal with the loans authorised under the resolution of the company already mentioned, and also under the resolution in England, of the 7th of October, 1858, by the proprietors there, confirmed by the resolution in Canada of the 2nd of November, 1858, to the effect "That the directors be authorised to advance to the Detroit and Milwaukee Railway Company a further sum of money not exceeding £100,000 sterling, to be expended by and under the control of the Great Western Railway Board of Directors," is to assume that the company had in England properly provided or arranged for the funds, by an increase of share capital or otherwise, to meet those loans, and that the money was available there for that

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purpose. There is nothing to the contrary shewn, and I think we cannot infer that they contemplated or were doing any thing illegal in furnishing or procuring the money. I think also we should assume that these resolutions were regularly passed, and by proper authority: their legality has not been questioned before us. Adopting then this position, we must, I think, hold that the directors of the company as the authorised agents of the shareholders were to arrange how this money so agreed to be loaned was to be advanced from time to time, as well in regard to amounts and times of advance, as to the method by which the money was to be procured from England to be made available in Canada, and in the locality where its expenditure was to take place. The body of shareholders could not discharge this ministerial duty, though it required the exercise of some judgment. The directors themselves, numerous as they were, could not collectively receive or disburse the money; and hence it became necessary for them to select sub-agents through whose hands the money should pass, and who should be authorised to receive it. They did select for this purpose, Mr. *Brydges*, the managing director of the company, and Mr. *Reynolds*, who had charge in Canada of its finances. These gentlemen, for we may take it that they were acting in concert throughout, in the month of December, 1857, proposed to Mr. *Ross*, cashier of the bank of the respondents, to advance to the Detroit and Milwaukee Railway Company sufficient money for their requirements, and exhibited to him the resolution of the Great Western Railway proprietory, sanctioning the loan of £150,000 sterling. What passed at this interview, at which Mr. *Reynolds*, but not Mr. *Bridges* personally, was present, is narrated by the parties thereat in statements most opposing. This much, however, we can arrive at, that the final arrangement between the parties was that an account was to be opened in the name of the Detroit and Milwaukee Railway Company, with the term "account Great Western Railway Company" superadded, and that any

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balances overdue on the account after crediting traffic receipts of the Detroit and Milwaukee road paid in, were to be covered by bills of exchange on England, at least to the extent of the £150,000 sterling. An account in accordance with this arrangement was opened by the bank, and the moneys paid out upon it from time to time were so paid upon cheques, by or on behalf of the Detroit and Milwaukee Railway Company, and not the Great Western Railway Company. It is admitted, if not proved otherwise, that the bank had notice of the two resolutions of the Great Western Railway Company for the loans to the Detroit and Milwaukee Railway company, and on the strength of the first resolution the original arrangement was made. We are of opinion that the bank are entitled to recover the amount of the loans authorised by these two resolutions, but no more. I do not think that the proprietors in England, nor perhaps the directors there or here contemplated the effecting any loan in Canada to meet these amounts. Indeed we proceed on the assumption that they did not; and that they had, or had arranged to have, the money in hand in England. The evident intention was, that when there were no surplus funds of the Great Western Railway Company, in Canada, which could be applied upon the loan authorised, bills should be drawn upon the company at home to procure the required amount. But, as I have already said, we must treat the directors as having authority to arrange the mode in which this should be done, and as having power to authorise, and as having authorised, Messrs. *Brydges* and *Reynolds*, as their agents, to act here for them to that extent. These gentlemen then seem to have procured immediately from the respondents, and afterwards from time to time, as was required, money to satisfy these loans, upon the understanding and promise that any balance due to the bank after crediting moneys deposited on account should be re-paid or re-placed by exchange on England. Messrs. *Brydges* and *Reynolds*, we think, had received authority to draw bills of exchange to the amount of these loans,

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and might have done so, and sold them to the bank. Instead, however, of taking this course, they procured the money from the bank on the faith of this exchange being given. They in fact sold the bills with the promise to deliver them, and the bank advanced the money in anticipation of receiving them, and we think that that promise and that anticipation should be fulfilled; and that for so much of the £250,000 sterling named in the resolutions referred to as has not been re-paid to the bank, they, the respondents, should have a verdict, the jury having found upon evidence properly submitted to them, that the credit for the moneys so advanced was given to the Great Western Railway Company, and not to the Detroit and Milwaukee Railway Company, notwithstanding the form of account adopted. I cannot, however, part from this branch of the case without stating that I have had great difficulty in concurring in the right of the bank to receive any thing more than the $750,000 of loan made legal by legislation, and I

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have still doubts as to whether the authority given by the statute of 22 Victoria authorised any such further loan. It gives the company power to lay down rails out of the province, and to provide facilities at stations, and otherwise, for consolidating its traffic; but I think it is open to very grave doubt whether they have authority to make loans to independent companies to complete their line of road. If they have, I see nothing to prevent them extending aid for constructing a railway to the Pacific, whose traffic might pass over their road, and be thus of great advantage to them; and so to any other roads, even to the building of them when it could be shewn that their existence would be of benefit to the business of the Great Western Railway Company. I do not think that the sanction of the previous loan implies, and it certainly does not confer any authority to make another such loan, but if any thing the contrary. The legislature simply confirms what had been done, but it does not say "go and do likewise," though I admit it is difficult to put any limitation on the loan of funds

which the act permits; but considering how foreign such application of the funds is to their use or destination, as contemplated by the charter of the company, I think this provision of law should receive as strict and limited a construction as is consistent with its terms. 1864. Gt. Western Railway Co. v. Commercial Bank.

I do not see on what ground the sums advanced by the respondents, for the Detroit and Milwaukee Railway Company, beyond the £250,000 sterling, can be recovered. The respondents had not only notice that the moneys they were advancing were to be expended for or by the Detroit and Milwaukee Railway Company, but they actually paid those moneys to the latter company, on cheques drawn on its behalf, as expressed on the face of them. They were bound to take notice of the act of parliament which gave the Great Western Railway Company authority to expend its funds out of the province for the purposes referred to in the section of the act already quoted, and which provided that such expenditure could not be legally incurred unless sanctioned by a vote of two-thirds of the shareholders; they knew that the shareholders had already passed two resolutions, limiting the amount of the loan which should be made by the one company to the other, and they did not know, and could not know, of any authority justifying a further advance, for none such existed. What right, then, had they, dealing alone with two officers of the company, without ascertaining their authority, to charge or seek to charge their principals with such advances made for such a purpose? Ordinarily agreements by corporations should be under their respective seals; exceptions being admitted in regard to such transactions in the course of their every day business as would render such a formality inconvenient and an obstruction. But can it be said that a transaction of such magnitude as took place here between the two or three corporations involved in it would fall within any such exception? When a party, dealing with a corporation or rather with the officers of a cor- Judgment.

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poration in the irregular manner in which the respondents here dealt, seek to charge that corporation with responsibility for the acts of those officers, I think the corporation may fairly be allowed to say, shew by what authority those officers used our name and pledged our credit; have you any resolution by us authorising it, or even any instrument under our seal, authenticated in the usual way by our representative for that purpose, sanctioning such dealing? This is not the case of a party contracting with a corporation in a matter within the scope of its objects and powers where every thing appears to be regularly and formally done, but there happens to be a non-compliance with some regulation, rule, or provision which has been established for the governance of the corporation or of its officers, and of which the party so contracting had no notice. Here was a most irregular course of dealing on the part of the bank, and in a transaction not in, but out of the ordinary course of business of the Great Western Railway Company, and one of a most special character, and only to be permitted or justified under and in compliance with a particular provision for that purpose made by legislative enactment, which the Bank were bound to know. It is not the case of the Great Western Railway Company over-drawing its own account, which may have fluctuated from week to week or day to day, and suddenly stopping it with a balance against them. Disguise the matter as either party may, the advance in this case was not for the purposes proper of the Great Western Railway Company, but to or for the Detroit and Milwaukee Railway Company; and is not therefore the case of a mere overdrawn account, but the case of a loan directly and deliberately made, if not to, at least for, the last named company, to be covered by deposits or exchange. The truth, I think, is that both Mr. *Ross* the President of the Bank, and *Brydges* and *Reynolds* indulged in the hope that the receipts of the Detroit and Milwaukee Railway would, with the £250,000 sterling loan, cover all the advances which the Bank would from

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time to time make, and that in this faith the account was carried on. Disappointed in this, the Bank seek to enforce payment of the moneys they have lost from the company; and the officers of each corporation are found giving most contradictory statements of what passed between them, influenced, doubtless, by the views which they respectively took at the time they embarked in the transaction, but which they, it seems, did not make sufficiently clear the one to the other. It is said, however, that the Great Western Railway Company have got the benefit of this money, and that it was advanced at all events with the knowledge of the directors, and that the shareholders subsequently ratified its expenditure. I think none of these positions sustained. The money was not expended on the road of the Great Western Railway Company, or on any of their works or property, and it cannot therefore be said that the company by such expenditure have so much more property. It was loaned to a company in whose welfare they doubtless had or thought they had an interest, as they had in all roads which could in any way be brought into connection with their own, or lead traffic to it, but this was not an using and enjoyment by them of money expended on their own property. There is no evidence to shew that the directors ever knew of the state or even of the existence of the account opened with or on behalf of the Detroit and Milwaukee Railway Company. On the contrary, those of them who were examined as witnesses had never heard of it; and the account being kept separate from the Great Western Railway Company's account proper, which was alone from time to time submitted to the Directors, the Bank enabled the officers of that company with whom they dealt to keep the directors in ignorance of these advances. The proprietors never sanctioned the advances which were made, and for aught that appears never knew of them till this suit was instituted; and it does seem a monstrous proposition that the superintendent of a railway or any other company, whose business is not the borrowing or lending of money,

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can involve the shareholders in any amount of liability which he in his recklessness may choose thus to incur. The shareholders expressly limited the amount for which they were willing and intended to be liable, and the board in England again and again forbade Mr. *Brydges* and Mr. *Reynolds* going beyond it. Every precaution to prevent any excess was taken, and yet in the face of all this we are asked to make the corporation responsible not merely for the unauthorised but for the forbidden acts of their officers. The report of the directors in answer to certain charges of a committee of investigation, which was relied upon as shewing knowledge and acquiescence by the shareholders, shews the contrary. In that report they are expressly informed that the expenditure on the Detroit and Milwaukee railway consisted of the £250,000 sterling loan, and an additional sum produced from traffic receipts and moneys obtained in America, not by or on the credit of the Great Western Railway Company, but by the Detroit and Milwaukee Railway Company. We think there was neither previous sanction nor knowledge from time to time, nor subsequent ratification by the shareholders, or even the directors, of the dealings between Messrs. *Reynolds* and *Brydges* and the Commercial Bank in respect of this Detroit and Milwaukee railway account; and that therefore for any sum beyond the £250,000 the appellants are not liable.

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As to the evidence objected to, we think that the entry in the Commercial Bank books of the minute of the Board of Directors in regard to the application made by Mr. *Reynolds* to Mr. *Ross* to open this account was properly received in evidence. It was an entry made at the time, and initiated and authorised the transaction on the part of the bank; and as shewing what they had agreed to do, and had authorised their own officers to do, we think it admissible, being part of the *res gestæ*.

The other two pieces of evidence objected to, viz., the monthly statement of the bank's transactions at the

Hamilton agency, in which appears the balance of the Great Western Railway account, and the first advance of $100,000, stated there to be to the Detroit and Milwaukee railway, and the report made to the shareholders already referred to, we think were unimportant, and if they had any bearing at all in the case were rather in favour of the appellants, who object to them. The view which we have taken of the rights and liabilities of the parties was not presented to the court below, nor indeed was it prominently discussed before us. Each party seem to have rested upon the extreme rights claimed by them. The one to the full amount of the money advanced: the other to freedom from liability for any thing. The court below thinking the plaintiffs entitled to judgment for something, and without deciding what that was, refused, and properly, a nonsuit, and also refused a new trial, inasmuch as something was undoubtedly due to the bank, and a nominal verdict for it had been rendered, subject to the award of a referee, who was to fix the amount to be paid by the appellants, with power to report special facts. We think, however, that the extent of the liability of the appellants upon the evidence furnished should have been declared by that court, as we now find it, and that in this view there must be a new trial, unless the parties, under the opinion now expressed by us, will pay the amount for which we think the defendants can be alone made liable, or choose to ascertain it by a reference, or, in case any additionl facts likely to vary the opinions we have expressed can be furnished, choose to leave them to be ascertained or reported also by a referee. Of course it is desirable that neither additional expense nor delay should be incurred, but unless the parties arrange otherwise, we have no alternative than to grant a new trial, and without costs.

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The following note of the judgment of the Honourable the President of the Court who, from indisposition, was unable to attend at the time judgment was delivered, was read by His Lordship, Mr. Justice *Hagarty*.

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McLEAN, *Prest.*—This case was tried before the late Mr. Justice *Burns*, at Kingston, in May, 1862, and was left to the jury with certain questions in writing, to which they were requested to give answers in writing.

1st. To which company was credit given by the bank, to the Great Western or to the Detroit and Milwaukee? or was the credit given upon the responsibility of Messrs. *Brydges* and *Reynolds*, irrespective of either company?

2nd. Had Messrs. *Brydges* and *Reynolds* authority from the Great Western Railway Company to make financial arrangements for the Detroit and Milwaukee Company to the extent of £250,000 sterling, agreed to be loaned by the former to the latter company, and was the account of the Commercial Bank opened and conducted by them in pursuance of such authority?

3rd. Had the Commercial Bank notice at any time while the account was going on that Messrs. *Brydges* and *Reynolds* had exceeded their authority, or that more than the two loans, amounting to £250,000 sterling, had been expended?

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4th. Suppose the original credit was given by the bank to the Great Western Company on the opening of the account, was there any understood limitation between the parties as to the question of liability at the time the letter of the 16th of December, 1858, was given, either to the extent of the second loan of £100,000 sterling or otherwise, or was the account continued after that period in the same manner as before by the parties.

5th. Did the Great Western Company by its dealings with the Detroit and Milwaukee Company reap the benefit of the expenditure made by the Commercial Bank on the Detroit and Milwaukee account.

The jury gave answers in writing to these queries—

To the 1st. That the credit was given to the defendants.

2nd. That *Brydges* and *Reynolds* had authority to open the account with the plaintiffs, and that the account was opened and conducted by them in pursuance of that authority.

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3rd. That the bank had no notice that Messrs. *Brydges* and *Reynolds* exceeded their authority.

4th. That there was no limitation as to amount at the time the letter of the 16th of December, 1858, was given, and the account was continued in the same manner as before the date of that letter.

5th. That the Great Western Company by its dealings with the Detroit and Milwaukee Company did reap the benefit of the expenditure made by plaintiffs on the Detroit and Milwaukee account.

On the finding of the jury in favour of the plaintiffs of the several points submitted to them, a verdict was entered in their favour subject to be entered for such amount as shall be ascertained upon a reference, as agreed on. The agreement as to such reference is endorsed on the record, as follows: "It is agreed by the counsel for the parties in this cause that the amount for which a verdict shall be entered, if the plaintiffs shall be entitled to a verdict, shall be ascertained by a referee, to be chosen by the parties respectively, in term or otherwise, and if the parties cannot agree upon a person for that purpose, then it is agreed between the parties that I shall nominate the referee as upon a compulsory reference. The referee to have power at the request of either party to report upon the different classes of the account, such as amounts paid upon coupons, upon cheques, upon promissory notes or otherwise, and to draw up a statement of facts upon each, for the opinion of the court."

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In Easter Term last, a rule *nisi* was obtained calling upon the plaintiffs to shew cause why the verdict should

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not be set aside and a nonsuit entered pursuant to leave reserved at the trial on various grounds. (*a*)

The judgment of the court was delivered Mr. Justice *Hagarty*, Mr. Justice *Burns* and *McLean*, C. J., after mature consideration, concurring therein. This appeal is against that judgment, and the reasons for appeal and the respondents' reasons against the appeal are fully set out in the appeal book from p. 11 to p. 24, inclusive.

It appeared in evidence at the trial, and I believe is undisputed, that in August, 1857, an account was opened by the plaintiffs with the Great Western Railway Company, under the sanction of the Canada board of directors, and this seemed to have been done in consequence of the Bank of Upper Canada, with which the Great Western account had been previously kept, refusing or declining to make further advances until the amount of overdrafts were arranged. This was done through the plaintiffs, who assumed on behalf of the defendants the whole amount of such overdrafts. In the month of December, 1857, the plaintiffs were informed through their agent at Hamilton, that the financial director of the defendants wished to make an arrangement for drawing moneys voted by the shareholders in England for the Detroit and Milwaukee Railway Company, in order that that company by the completion of its road should be brought into connection with the Great Western Railway Company. In consequence of that communication, the plaintiffs' cashier came up from Kingston to Toronto, where by appointment he met the financial director of the railway, Mr. *Reynolds*, and the agent of the bank at Hamilton. The cashier of the bank and the agent at Hamilton give testimony as to what the arrangement was with respect to the account for the Detroit and Milwaukie Railway Company, in which they perfectly agree, but Mr. *Reynolds* gives a totally different version of the transaction, and states

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(*a*) See report of the case, 22 U. C. Q. B. R. 236.

positively that the name of the Great Western Railway was not mentioned in connection with the arrangement respecting the moneys to be advanced for the completion of the Detroit and Milwaukee Railway from the loans made for that purpose by the shareholders in England. In the statement of Mr. *Reynolds* as to what took place at the meeting between him and Mr. *Ross* at Toronto, he says, (p. 67,) that at that meeting he saw Mr. *Ross*, and took with him a *statement* and the *resolutions* of the Great Western board relative to the *loans* which Mr. *Brydges* and himself were instructed to employ in the completion and equipment of the Detroit and Milwaukee road. Mr. *Reynolds* may have inadvertently referred to *both loans* and the *resolutions* by which the London board decided upon their being made, but at the time of the meeting, 29th December, 1857, only one of the loans, for £150,000, had in fact been made; that loan was under a resolution of the English board of the 8th of October, 1857, assented to at Hamilton by the Canadian board on the 2nd of November, 1857, and at the meeting at Toronto of the 29th of December, it could not possibly have been known that a further loan for a similar purpose would be made to the Detroit and Milwaukee Railway Company to be expended by the same persons, the agents and servants of the Great Western Railway Company.

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When the loan of £150,000 was made, and Messrs. *Brydges* and *Reynolds* appointed as agents for expending it, some mode must have been contemplated for transferring the amount to Canada, where the agents lived, who were entrusted with the expenditure, and it is not unreasonable to suppose that the agents were instructed to draw for the amount, as required, by bills of exchange. That they had authority to draw, is evident from the minutes of the English board, of the 18th May, 1858, (appendix, page 30,) at which it is stated that "a letter was written by the board to Mr. *Pollard*, manager London Joint Stock Bank, advising

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him of the maturity on the 20th May, instant, of the draft of Messrs. *Brydges* and *Reynolds* on Detroit and Milwaukee loan account, accepted by the board for the sum of £6,000," requesting him to enter the same to the debit of the company. Again in the minutes of the same board on the 12th April, 1859, is a similar minute in reference to a draft of Messrs. *Brydges* and *Reynolds*, for £20,000, accepted by the resolution of the board, and falling due on the 17th April. The board, by accepting the drafts of their agents, must be supposed to have given them, as individuals, a right to control the moneys which they were authorised to expend, and if the plaintiffs, knowing them to have such authority, advanced from time to time, on their request, moneys to be expended in carrying out the views of the board in making loans, I cannot think that the plaintiffs, as bankers, were bound to ask what particular work, or for what particular object the amount was to be applied. That a large amount was advanced by the plaintiffs for an object in which the defendants were deeply interested, is manifest, and if the defendants' agents have exceeded their authority, the plaintiffs having no notice of that fact, ought not to lose the amount of their advances. The defendants were extremely anxious to have the Detroit and Milwaukee Railway completed, under a conviction that it would form a most valuable connection with the Great Western, and when they agreed to make the first loan of £150,000 sterling, it was under the impression that that would be sufficient. Subsequently a further loan of £100,000 was sanctioned, for the purpose of equipping the road, and providing stations. If, then, any portion of the latter loan was in fact expended in completing the road, such expenditure might be considered as contrary to the intention of the shareholders and *ultra vires*, but the plaintiffs could not, in advancing the moneys, be considered as parties to the misapplication of the money, and on that account not entitled to recover.

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The jury have found, upon the trial, that Messrs.

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Brydges and *Reynolds* had authority from the Great Western Company to make financial arrangements for the Detroit and Milwaukee Company, to the extent of £250,000 sterling, agreed to be loaned by the former to the latter company, and that the account with the plaintiffs was opened and conducted by them in pursuance thereof. There was abundance of evidence before them on that point, and I think the finding is correct.

In August, 1857, the company's account was transferred from the Bank of Upper Canada to the Commercial Bank, and when, in December following, the intelligence was received of the Great Western Board, in London, making the loan of £150,000, it was quite natural that Messrs. *Brydges* and *Reynolds* should avail themselves of the company's bankers, for the purpose of getting the money to be expended by them. On the 29th December, the interview between Mr. *Ross*, the cashier of the bank, and Mr. *Reynolds*, took place, when the arrangement was effected respecting which the witnesses differ so very materially. Judging from the testimony, I cannot but think the testimony of Messrs. *Ross* and *Park* entitled to prevail. Certainly it would be extraordinary if Mr. *Ross*, on the very first occasion of his meeting Mr. *Reynolds*, and without consulting with the directors of his bank, and with the knowledge that £150,000 sterling was awaiting the drafts of Messrs. *Brydges* and *Reynolds*, to be expended by them, should, nevertheless, consent to advance on the credit of the Detroit and Milwaukee Company any amount which *Brydges* and *Reynolds* might require. It is much more reasonable to suppose that Mr. *Ross* should decline such a responsibility, and that he should make the proposition to place any amount of advances to the debit of the Great Western Company. There can be no doubt that the plaintiffs were entitled to a verdict for something, and that the application for a new trial was properly refused. The means of ascertaining how much the verdict should be for, was agreed upon between the

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parties, and is yet open; if the referee has included any objectionable items in his report, the court may refer the matter back to him with their opinion, and he will, no doubt, correct any error he may have made. I should be exceedingly averse to sending the case again to a jury; the interests of both parties seem to forbid it.

I do not see any sufficient grounds for the appeal, and therefore I am of opinion that it must be dismissed with costs. While I am obliged to come to this conclusion, I must acknowledge that the intimation given by both parties that the case will be still further appealed, affords me much satisfaction. The amount in dispute is very large, and the law, as to the liability of corporations, unsettled, and a decision from the highest court of appeal will go far to establish the law in such cases.

Judgment.

HAGARTY, J.—I was not present at the argument, and therefore give no judgment; but I think it right to add to the judgment just delivered, that in the elaborate argument of the appellants in the Queen's Bench no distinction whatever was pressed on the court between the liability for the unpaid portions of the two loans and the residue of the claim. Nor, as far as the papers shew, was any such point made at the trial.

The voluminous grounds of nonsuit or new trial do not suggest it. It is clear there could not have been a nonsuit, and as to setting aside the verdict the plaintiffs were, it seems, entitled to recover about £100,000; so that in accordance with the views of the Court of Appeal, the judgment of the Queen's Bench was technically correct in discharging the appellants' rule.

The difficulty is created by the fact of the verdict being for a nominal sum, with a consent endorsed on the record that the amount for which the verdict should be entered was to be fixed by an arbitrator: "The referee to have power to report upon the different classes of the account, such as amounts paid upon coupons, upon

cheques, upon promissory notes or otherwise, and to draw up a statement of facts upon each for the opinion of the court."

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In the view of the Court of Appeal the plaintiffs cannot recover beyond the unpaid portions of the two loans, and unless some new facts can be given in evidence, if a new trial take place the judge must so charge the jury.

If the referee find the facts as he is impowered to do, the court can apply the law now declared to these facts, and so a new trial be needless; or perhaps if an award be made it could be referred back to the referee with a direction to find in accordance with the view of the law now declared.

Statement.

On hearing the judgment of the court, the counsel for the plaintiffs urged that there should be no new trial, but that the referee already named, guided by the opinions expressed by the court, should fix the amount due to the plaintiffs, as both parties had at the trial by counsel withdrawn the question of amount from the consideration of the judge and jury, and had consented to a verdict for one shilling, subject to be increased by the award of an arbitrator, who it is admitted was appointed.

The court on consideration ruled that if the plaintiffs desired a new trial it should be granted to them without costs. That if the defendants (the appellants here) desired a new trial it should be granted to them on payment of costs; but that if both parties consented, the case should be remitted to the arbitrator to ascertain the amount due to the plaintiffs (the respondents here) in accordance with the opinion of this court. That each party should elect and give notice to the other before the first day of April next, whether or not they would agree to the further reference; that the party giving such notice should be bound thereby, and that if the

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appellants, the defendants below, did not give such notice before that day then a new trial to be ordered with costs to be paid by the appellants, the defendants in the court below.

[*Before the Hon. Arch. McLean, Ex-C. J., President, the Hon. W. H. Draper, C. B., Chief Justice of Upper Canada, the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. B. Richards, Chief Justice of the Common Pleas, the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Morrison, and the Hon. Mr. Justice John Wilson.*]

ON AN APPEAL FROM THE COURT OF CHANCERY.

THE DESJARDINS CANAL COMPANY, APPELLANTS, AND THE GREAT WESTERN RAILWAY COMPANY, RESPONDENTS.

Specific performance of agreement to accept work after inspection—Appointment of engineers to inspect—Reference to master to enquire.

Two incorporated trading companies agreed by writing under their corporate seals, that certain works which were to be constructed by one for the other, should, on completion, be inspected by engineers to be chosen by the companies respectively, and if reported as completed, the works were to be accepted by the party for whom they were done, who from thenceforth should be debarred from denying or contesting the due and proper execution and acceptance of the works. After the works were alleged to have been completed the parties who performed the same notified the others thereof, calling upon them to appoint an engineer, which was not done, and subsequently a portion of the works having been destroyed, a bill was filed to compel the parties so neglecting to accept the works. The court below, (*Vankoughnet*, C., *dubitante*,) considering that the delay which had occurred in naming an engineer, according to the terms of the agreement, ought not to preclude the parties from obtaining an inspection of the works, made a decree in favour of the plaintiffs, but under the circumstances directed a reference to the master for the purpose of enquiring and reporting as to the due performance of the works. On appeal, this decree was reversed, and the bill in the court below ordered to be dismissed with costs, (*Esten*, V. C., dissenting.)

This was an appeal from a decree of the Court of Chancery, as reported in *Grant's* Chancery Reports, volume 9, page 503, where the facts sufficiently appear.

The decree drawn up on the judgment there reported,

directed "that the decree granted in this cause be varied so far as the same directs that the said defendants should within one month after service upon them or their solicitor of the said decree, nominate an engineer referee, or in default, that this court should name one to co-operate with the chief engineer of the said plaintiffs, and to proceed according to the terms of the agreement and specifications mentioned, and to report to this court whether the said works at any time heretofore had been completed according to the terms of the said agreement and specifications. And in the event of the engineer of the plaintiffs and the engineer nominated by the defendants or by this court, as the case might be, as hereinbefore provided for, not being able to agree, then the said engineers were to nominate a third engineer; and in that case the said two first named engineers, and such third engineer were to proceed according to the terms of the said agreement and specifications to examine as aforesaid; and they or any two of them were to report as aforesaid.

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"And it is ordered that instead thereof it be referred to the master of this court, to inquire and report to this court, whether the works including the bridge in the pleadings and in the agreement and specifications in the pleadings mentioned at any time heretofore have ever been completed according to the terms of the said agreement and specifications.

Statement.

"And it is ordered that the deposit paid into court on the re-hearing be equally divided between the plaintiffs and defendants: and with the foregoing variations and additions, it is ordered that the said decree be and the same is hereby affirmed.

"And either of the parties to be at liberty to apply to this court as they may be advised."

From this decree the defendants appealed, assigning the following reasons against the same:

1st. Because the agreement in the pleading mentioned, the specific performance of which is sought by the plaintiffs in this suit, was never a proper subject of the jurisdiction of a court of equity.

2nd. Because in the event which had happened,

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before the filing of the plaintiffs' bill, of the destruction of the suspension bridge in the agreement and pleadings mentioned, it had at the time of the filing of the said bill become impossible to have a specific execution of the agreement which the plaintiffs sought to enforce.

3rd. Because the decree as modified on the re-hearing does not direct a specific performance of the agreement which the bill seeks to enforce, but gives relief which the parties never contracted for.

4th. Because a court of equity does not possess jurisdiction to decree relief such as is given by the decree on the re-hearing, irrespective of agreement or contract

5th. Because the bill makes no case for any such relief as that given by the decree pronounced on the re-hearing of the cause.

6th. Because the evidence shows that the works contracted to be performed by the plaintiffs have never been completed, and therefore have never been in a fit state for inspection.

Statement.

7th. Because although it was incumbent on the plaintiffs to have shown that the works had been completed and were fit for inspection according to the contract, the plaintiffs give no evidence.

The reasons assigned by the plaintiffs the now respondents, in support of the decree, were

1st. That the same is correct for the reasons stated in the judgment.

2nd. The alteration made in the decree on re-hearing was made at the request of the appellants, assented to by the respondents.

3rd. It is immaterial whether the respondents could have been originally decreed to perform their part of the contract c. in case it appears that they have performed it, specific performance should be decreed.

4th. The decree appealed from is not final or proper to be appealed from.

5th. The agreement in the pleadings mentioned having been acted upon should be fully performed, and no adequate remedy short of specific performance can be obtained.

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Mr. *Strong*, Q. C., and Mr. *Blake* for appellants.

Mr. *Roaf* and Mr. *G. D. Boulton*, for respondents.

In addition to the cases cited in the court below, *Pickering* v. *The Bishop of Ely*, (*a*) *Johnston* v. *Shrewsbury and Birmingham Railway Co.*, (*b*) *Stocker* v. *Wedderburn*, (*c*) *Gervais* v. *Edwards*, (*d*) *Ogden* v. *Fossick*, (*e*) *Peto* v. *The Brighton, &c., Railway Co.*, (*f*) *Counter* v. *Macpherson*, (*g*) *Price* v. *The Mayor, &c., of Penzance*, (*h*) *Wells* v. *Maxwell*, (*i*) *Jackson* v. *Jackson*, (*j*) *Baker* v. *The Metropolitan Railway Co.*, (*k*) *Heys* v. *Astley*, (*l*) *Fry on Spec. Per.*, *sections* 95, 96, 97, 240, were referred to and commented on by counsel.

RICHARDS, C. J.—If the doctrine that where a court of law can do complete justice between the parties, then that a court of equity will not ordinarily intervene be correct, I see no reason why the parties should not be left to their legal remedies. The effect of the decree as I understand it is to transfer the decision of the question whether the plaintiffs have performed their contract from a court and jury to the master's office, a tribunal certainly where facts of this nature are not likely to be investigated in so satisfactory a manner as at *nisi prius* before a court and jury.

Judgment.

The modern cases shew that courts of equity, following what seems to be the natural and usual course of all tribunals of a similar character of extending their jurisdiction, have exercised the right of disposing of cases in which there is a remedy at law. But in these cases the ground on which the equitable jurisdiction is invited seems to be, that a court of equity can do more complete

(*a*) 2 Y. & C. C. &. 249.
(*b*) 3 D. M. & G. 914.
(*c*) 3 K. & J. 393.
(*d*) 2 D. & W. 80.
(*e*) 9 Jur. N. S. 288.
(*f*) 32 L. J. N. S. Ch. 677.
(*g*) 5 Moo. 83.
(*h*) 4 Hare, 506.
(*i*) 11 W. Rep. 676.
(*j*) 1 S. & Giff. 184.
(*k*) 1 New R. 8.
(*l*) 3 New Rep. 19.

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justice than a court of law, or that the matters in controversy can be more conveniently investigated and disposed of through the machinery of the court of equity.

In a comparatively recent case (*a*) proceedings were instituted in the Court of Chancery by a contractor against a railway company to recover the value of work done for the company, and claims for compensation arising out of the contract; the jurisdiction in equity was sustained although no fraud was alleged, and one of the principal grounds for continuing the proceedings in equity, was that if the plaintiff sued at law the judge at *nisi prius* would undoubtedly refer the case to an arbitrator, whereas in equity the matter could be diposed of before an officer of the court, who from time to time would be under the direction and control of the court, and this would be a more efficient and satisfactory way of disposing of the case than if it went before an arbitrator.

Judgment.

If the court had directed that the defendants should appoint an engineer who with the engineer of the plaintiffs should examine the works and certify if they had been properly completed or not, supposing that the court could under the circumstances of this case make such a decree, still the defendants would not be able to get what they had a right to expect from the agreement, viz., the opinion and judgment of skilled persons on work which they had personally examined and as to which they were satisfied the plaintiffs had performed their contract. The bridge having been destroyed it cannot now be examined as a structure, and whether the plaintiffs have performed their contract with respect to it or not, must now be a matter of evidence, and that evidence under the present decree must be before the master. If the now defendants should sue the present plaintiffs in a court of law, for not executing and completing the works properly and according to the contract, they must prove the allegations to that effect

(*a*) McIntosh v. Great Western Railway Co., 3 Sm. & Giff. 146.

contained in their declaration, if they are denied, or they will fail in their action. Yet this is the very question which, under the decree, is referred to the master, and he must dispose of it under the evidence brought before him, so that in truth the effect of the decree is, as already intimated, to transfer the investigation to the master which could be better conducted before a court and jury. What is shewn to be the effect of the decree as now framed seems to me to afford sufficient evidence of its impolicy.

In the argument by way of sustaining the judgment of the court below, it is assumed that the plaintiffs have fully performed their part of the undertaking, and therefore it would be unnecessary to decree specific performance on their part, (which under the circumstances of this case it is not pretended would be directed,) even if it were manifest that the contract had not been performed on their part. But the decree itself is to ascertain that very fact and not to appoint the engineer to ascertain it.

Judgment.

It seems to me that the doubts and difficulties suggested by his lordship the Chancellor in the court below, as to the propriety of making this decree under the facts disclosed, cannot be overcome.

The position of the plaintiffs before the court is this; they ask that the court may appoint an engineer to proceed in company with their engineer to inspect the works, and that the defendants may be perpetually enjoined from commencing any suit at law in reference thereto; so that their real object is to restrain the defendants from suing them at law for a breach of this very agreement, and anticipating them in the commencement of the suit, they wish to have the matter disposed of in a different way, and having obtained the decree appealed against, they propose to have the questions as to the performance of the contract settled in the master's office, instead of allowing the defendants to bring them before a court and jury.

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It being admitted that there cannot be an inspection of the bridge because it is destroyed, neither plaintiffs nor defendants can have the judgment of any engineer from his own personal examination (unless such examination was made before the bridge was destroyed) as to how far the work has been performed according to the contract. As what the parties contracted for and what both desired is not now attainable, I think the court below ought to have dismissed the plaintiffs' bill, leaving the parties to their legal remedies.

If to enable the plaintiffs to recover something due them from the defendants it had been necessary to obtain the certificate of the engineers that the work had been performed according to the contract as a condition precedent to their recovery, and in consequence of the defendants' delay to name an engineer in their behalf, such certificate could not be obtained; under such circumstances the assistance of a court of equity might with some propriety be invoked to aid the plaintiffs in obtaining what was really due them, or at all events in removing the obstruction to a recovery at law which the condition precedent interposed, but here no such obstruction exists, and there seems no sufficient reason why the contest between the parties should be withdrawn from the ordinary tribunals.

Judgment.

Although the defendants might have appointed an engineer who could have attended to the matter, and in that respect may be considered responsible for the delay which took place in examining the work, yet it does not appear there was any intentional fraud in such delay, but it arose from the difficulty of procuring the attendance of Mr. *Page*, to whom they had applied to make the examination, but who, from his other engagements as engineer of the board of works, could not attend. If the plaintiffs considered it of such paramount importance to them to have the question of the proper performance of the contract on their part established they should have applied to the court within the two years in which the

bridge was standing to compel the defendants to select an engineer, and they could then have submitted that they would perform their part of the contract if it should appear that it had not been performed. But the plaintiffs themselves having delayed until a personal examination of the bridge became impossible, and the agreement as to the certificate of the engineers from such examination not being capable of being carried out, and no obstacle existing to the plaintiffs enforcing at law any of their other rights under the contract, I think the decree of the court below was wrong and ought to be reversed, particularly as it is sought for, to prevent the defendants from enforcing at law what may be their rights under the contract.

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Judgment.

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[*Before the Hon. Archibald McLean, Ex-C. J., President,* the Hon. William Henry Draper, C. B., C. J., the Hon. P. M. Vankoughnet, Chancellor, the Hon. William B. Richards, C. J. C. P., the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Morrison, and the Hon. Mr. Justice Adam Wilson.*

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY..

ELIZA HENRIHAN, ADMINISTRATRIX OF MICHAEL HENRIHAN, APPELLANT, AND JAMES GALLAGHER, RESPONDENT.

Lease with right of purchase—Personal representative heir-at-law.

Held, affirming the decree of the Court of Chancery, that an assignment by the personal representative of a lessee for years, does not carry with it a right of purchasing the fee contained in the lease; but this court varied the decree, by directing the vendee of the personal representative to execute a mortgage upon the property, the conveyance of which he had obtained from the lessors as assignee of the lease.

Sampson v. *McArthur*, (8 Grant 72,) remarked upon and over-ruled, so far as the same decided that the right to purchase contained in a lease was personalty.

Argument. This was an appeal from a decree of the Court of Chancery, as reported in Grant's Chancery Reports, volume ix., page 588, where the facts giving rise to the case sufficiently appear.

From that decree the plaintiff appealed, on the ground that the term created in the parcel of land by the lease in the bill mentioned, having, on the death of the lessee, *Michael Henrihan*, become vested in the appellant as administratrix, and the covenant contained in the lease on the part of the lessors, The Canada Company, conferring on the lessee the privilege of purchasing the fee simple and inheritance in the said parcel of land, being in its nature a covenant running with the land, the respondent, *James Gallagher*, by virtue of the conveyance and assignment made to him by the appellant,

* Was absent when judgment was pronounced.

became entitled to the benefit of such covenant, and to a conveyance of the land in fee simple, upon payment to the Canada Company of the purchase money, payable to them according to the tenor of the covenant. 1864. Henrihan v. Gallagher.

Mr. *Hillyard Cameron*, Q. C., and Mr. *Brough*, Q. C., for the appellant.

The effect of the decree from which this appeal is brought is to declare that the right to purchase the fee vested in the heir-at-law, and that the administratrix in assigning the term could not thereby affect the interest of the heir. The lease in question only gives an option to purchase.

The fallacy is in treating this mere option of purchasing as if there were a valid or binding contract for a purchase, to which the court would attach all the rights and liabilities of equitable ownership. The lease only created a term, and the covenant is incorporated with it, and has no existence out of or apart from it. Statement.

Had this lease been assigned by the lessee himself, it would undoubtedly have carried with it the right to purchase the fee; by the death of the lessee the term became vested in the administratrix, and the effect of her deed was to pass, and it did in fact pass, to *Gallagher* the residue of the term, and if so, the right to purchase went with it. *Welchman* v. *Sprinks*, (*a*) *Green* v. *Low*, (*b*) *Thompson* v. *Guyon*, (*c*) *Lawes* v. *Bennett*, (*d*) *Townly* v. *Bedwell*, (*e*) *Re Houghton*, (*f*) *Sugden's* Vendors and Purchasers, 14th ed. page 597, were, amongst other authorities, referred to.

The respondent did not appear.

(*a*) 5 L. T. N. S. 385.
(*b*) 22 Beav. 625.
(*c*) 5 Sim. 65.
(*d*) 1 Cox. 167.
(*e*) 14 Ves. 591.
(*f*) 11 Ir. Ch. 136.

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The judgment of the court was delivered by

DRAPER, C. J.—The opinion given by the late Sir *J. B. Robinson*, in *Sampson* v. *McArthur*, was not concurred in by the other members of the court, and the appeal in that case was dismissed exclusively on the points raised by the appeal itself, upon none of which they thought the plaintiff entitled to succeed. In that case his lordship expressed the opinion that the bill should have been dismissed with costs; but the defendant, *McArthur*, did not ask for or desire this, and was willing to take what the decree gave him, not asking for more, and the Canada Company simply submitted to do whatever was decreed, and the majority of the court neither expressed, nor intended to decide, that the right to purchase was to be viewed as personalty, and passed as such. I made a minute at the time of our dissent from the opinion as to that point expressed by his lordship, though we all concurred in dismissing the appeal.

Judgment.

I think that the right of purchase did not pass to the administratrix; and I should have been of opinion that this appeal should be dismissed with costs, but it has occurred to us that as between these parties it is just that a mortgage should be given by the defendant to the plaintiff. All we desire is to protect the rights of the infant heirs, which we think can effectually be done by inserting in the decree and mortgage that it is to be without prejudice to the rights of the co-heirs of *Michael Henrihan*, under the covenant contained in the lease.

The decree will, therefore, be varied to this extent.

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[*Before the Hon. Arch. McLean, Ex-C. J., President,* the Hon. W. H. Draper, C. B., Chief Justice of Upper Canada, the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. B. Richards, C. J. C. P., the Hon. Vice-Chancellor Esten, the Hon. Vice-Chancellor Spragge,* the Hon. Mr. Justice Morrison, and the Hon. Mr. Justice John Wilson.*]

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

DONALD A. MACDONALD, APPELLANT, AND ALEXANDER RODERICK MACDONELL, RESPONDENT.

Will—Construction of—Devising lands in Lower Canada—Conditional devise.

A married woman domiciled in Upper Canada, on the 17th December, 1828, made her will, the second paragraph of which was as follows: "I give, devise, and bequeath my house and property in St. Paul street, Montreal, left me by my former husband, *Michael Trudeau*, to my son *Allan*, with power to give an equal share to his sisters *Helen*, *Catherine* and *Harriet*, and to his brother *John*," and died shortly after the making of this will. On the 20th of March, 1842, her husband made and published his last will and testament, by the fourth and fifth clauses of which he devised lot No. 37 (the premises in question) to his son *John Watson Macdonell*, and lot No. 32 to his son *Alexander Roderick Macdonell*. By the 14th clause, he gave to his son *Allan* his watch, gold seal and gold ring. In a subsequent part of the same will (para. 16) he directed, that should *John Watson Macdonell* prefer to take possession of lot No. 32, then lot No. 37 was to become vested in *Alexander Roderick*, the same as if it had been willed to him. By a codicil to this will, dated on the 1st of April following, the testator declared his will and desire to be that his son *Allan* should take holy orders, but should *Allan's* health or any other reasonable cause or circumstance cause him not to enter into holy orders, he ordered and devised that *Allan* should have to himself, and his heirs for ever, the whole of the said lot No. 37, in which case *John Watson* and *Alexander Roderick* were ordered to receive certain other lands particularly mentioned, adding in a subsequent clause of the codicil, "*But should my son Allan not divide or give over in full an equal portion of the house in St. Paul street, Montreal, as was his mother's intention, as appears by her last will, in which case I order and devise, that my son Allan shall only receive of my property what has been willed to him in my last will, before this codicil was written, then this codicil to be null and void; otherwise to remain in full force and virtue.*" After the death of the testator, *Allan*, not having taken holy orders, entered into possession of No. 37, and also into the receipts of the rents and profits of the property in Montreal devised by his mother, treating it as his own absolutely, never having made any conveyance of any portion thereof or paid any share of the rents and profits to his sisters and brother,

Digest.

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* Were absent when judgment was delivered.

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and having also executed a mortgage thereon, as owner in fee, for his own benefit.

John Watson Macdonell had after his father's death chosen to take as his share lot No. 32, and thereupon *Alexander Roderick Macdonell* claiming that under the terms of the codicil he had become absolutely entitled to lot 37, brought ejectment therefor. It was shewn that by the law of Lower Canada, the words of the will of Mrs. *Macdonell* vested in the sisters and brother absolute interests in the property in Montreal, and that no conveyance or assignment by *Allan Macdonell* was necessary to vest their portions of the estate in them. *Held*, reversing the judgment of the court below, that the event upon which the estate was to become divested from *Allan* and to devolve upon the plaintiff had not happened: or, in other words, that the condition upon which *Allan* held the estate had not been broken. [ESTEN, V. C., dissenting.]*

This was an appeal from a judgment pronounced by the Court of Queen's Bench in an action of ejectment pending in that court, wherein the respondent was plaintiff, and the appellant was defendant.

The circumstances out of which the action arose, and the evidence adduced at the trial of the issue, are fully set forth in the report of the case in volume xix., page 130, of the reports of that court.

Statement.

From the judgment there reported the defendant appealed, assigning as reasons of appeal:—

Firstly,—That the codicil passes a present immediate interest in the land to *Allan Macdonell*, he not having taken orders of priesthood or holy orders.

Secondly,—That the proviso or condition contained in the third section of the codicil is a condition subsequent, and cannot defeat the previous devise in the codicil, or give the plaintiff a right to recover on the facts stated.

1st. Because the performance of it is impossible, in this, that it requires *Allan Macdonell* to give over to

* It is to be observed that the effect of this judgment is that the gift to *Allan* was in fact absolute, the law having already done all that he was directed to do by the will of the father, the condition therefore on which the estate was given to him was silent or inoperative.

his brother and sisters an equal portion of the St. Paul street property, whereas, under Mrs. *Macdonell's* will of 1828, as interpreted by the law of Lower Canada, where the property lies, such portion or interest had already passed and was vested in the brother and sisters, and therefore could not be given or conveyed: the condition being impossible of performance, the previous devise is absolute. 1864. Macdonald v. Macdonell.

2nd. Because said condition or proviso is unintelligible and insensible, and inconsistent with the codicil and will, and void, and cannot defeat the estate previously devised.

3rd. No time is fixed by the codicil, when *Allan* is to make over an equal share of the St. Paul street property to his brother and sisters, and no demand or refusal to do so has been proved, and such condition may yet be performed.

Judgment.

4th. If the will of Mrs *Macdonell* is to be interpreted by the law of Upper Canada, then it gave a life estate to *Allan Macdonell*, with a power of appointment of the inheritance of the St. Paul street property among his brother and sisters, which power of appointment may be exercised at any time during his life, and the estate devised to him by the codicil cannot be defeated until his death.

5th. That the condition in the codicil has been sufficiently complied with, the brother and sisters having received the shares to which they claimed to be entitled under Mrs. *Macdonell's* will, and having sold and disposed of the same.

Thirdly,—That on the evidence, plaintiff has shown no right to recover.

In support of the judgment of the court below the

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respondent asserted that there is no error in the said judgment of the Court of Queen's Bench, and that the *postea* was rightly ordered to be delivered to him: that on the evidence, his right to recover was clearly proved, and that the codicil or devise relied on by the defendant was defeated and became void, in consequence of *Allan Macdonell* not having made over to his brother and sisters an equal portion in the St. Paul street property, Montreal, devised in the will of his mother; and that this condition being broken, the devise over to the plaintiff took effect in law.

Mr. *S. Richards*, Q. C., for the appellant.

Mr. *J. Hillyard Cameron*, Q. C., for respondent.

Judgment.

DRAPER, C. J.—Ejectment for lot No. 37, 2nd concession Lochiel. A verdict was rendered at the trial in this cause for the plaintiff, subject to the opinion of the Court of Queen's Bench, who in Hilary Term (23rd Vic.) ordered the postea to be delivered to the plaintiff. Against that decision the defendant appeals.

The facts of the case are as follows: *Mary Macdonell*, being at the time the wife of *Angus Macdonell*, and domiciled in Upper Canada, on the 17th December, 1828, executed her last will and testament, in presence of three subscribing witnesses, containing the following passages: "Second.—I give, devise, and bequeath my house and property in St. Paul Street, Montreal, left me by my former husband *Michael Trudeau* to my son, *Allan Macdonell*, with power to give an equal share to his sisters *Helen*, *Catherine*, and *Harriett*, and to his brother *John*. Third.—I give and devise to my daughter *Mary Trudeau*, two gowns and a shawl. Fourth.—Any disputes arising in the distribution of the above property to be settled by the executors." She appointed her father, her husband, and a third person executors, and died soon after making this will.

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Allan Macdonell, son of the testatrix, was born on 12th November, 1818. After the death of the testatrix *Mary*, her husband *Angus* received the rents and profits of the house and property in Montreal, mentioned in the will, until his death, which occurred in 1843. He and one other of the executors named by *Mary Macdonell*, after her father's death, endorsed a memorandum on her will that they were of opinion that the testatrix intended by the will to confer an equal interest in the said house and property on her children, *Allan, Helen, John, Catherine, and Harriett*, "therefore, we do hereby order that the rents and profits arising from said house and property be equally divided between them." It was stated that there was a deed of partition between testatrix, as widow of *Trudeau*, and *Mary*, her daughter by *Trudeau*. *Angus Macdonell* died in 1843, seized in fee of No. 37, 2nd concession of Lochiel, and of other real estate in Upper Canada. He made a will, duly executed, to pass real estate, dated the 27th March, 1842, by which he devised the whole of lot 37, 2nd concession, Lochiel, to his son, *John Watson*, in fee, subject to a life estate to his widow, *Isabella*, in a certain portion thereof, and he gave to his eldest son, *Allan*, his silver double-cased watch, gold seal, and gold ring. To his son, *Alexander Roderick*, (the plaintiff,) in fee, No. 32, 2nd concession, Lochiel; to his son, *James Alexander*, in fee, No. 31, 2nd concession, Lochiel. But (by clause 16) in case *John Watson Macdonell* should prefer to take No. 32 to taking No. 37, the testator devised No. 32 in fee to him, and No. 37 in fee to *Alexander Roderick*, the plaintiff.

Judgment.

It was admitted that *John Watson Macdonell* had exercised this election, and taken possession of No. 32.

On the 15th April, 1842, *Angus Macdonell* made the following codicil to his will: "First.—It is my sincere will and desire that my son, *Allan*, should take and receive holy orders, and become an exemplary priest, as

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was the intention when he went to Rome. Second.—I order and desire that should my son *Allan's* health, or from any other reasonable cause or circumstance, cause him not to take holy orders, and not take orders of priesthood, in which case I order and devise that my said son *Allan* shall have to himself, and his heirs for ever, the whole of lot No. 37, 2nd concession, Lochiel, with exception of such reservations as have been made in my will;" and the testator, on the contingency of *Allan's* taking No. 37, makes changes in the disposition of his other lands, by devising to *John Watson Macdonell* lot No. 32, to *Alexander Roderick*, the plaintiff, the west half of No. 31, and to *James Alexander* the east half of No. 31. "Third.—But should my son *Allan* not divide or give over in full an equal portion of the house in St. Paul Street, Montreal, as was his mother's intention, as appears by her last will, in which case I order and devise that my son *Allan* shall only receive of my property what has been willed to him in my last will, before this codicil was written, then this codicil to be null and void, otherwise to remain in full force and virtue."

Statement.

Allan Macdonell swore at the trial that he was in possession of the house and property devised by his mother; that he occupied it, and drew the rents from the time of his father's death; that he considered himself entitled to the whole property under his mother's will, and, in consequence, drew all the rents. He never did divide the property with his brothers and sisters, but gave a mortgage on the whole property as his own. He also gave a mortgage on lot 37, 2nd concession, Lochiel, some years afterwards, to his brother, *John Watson Macdonell.* He swore he gave this mortgage with a view to secure it to himself, and to have it returned at some future period.

On the 12th July, 1844, *Allan Macdonell,* and his co-partner in trade, appeared before notaries public in Montreal, and acknowledged themselves indebted to

John Torrance & Co., merchants of Montreal, in £821 10s. 11d., current money of Canada, which sum, with legal interest from that date, they promised to pay on the 1st August, 1845, and for securing such payment *Allan Macdonell*, as proprietor under the last will and testament of his mother, *Mary Macdonell*, did charge, encumber, mortgage and hypothecate the premises mentioned in the said will, (describing it,) "the whole as bequeathed by the said late *Michael Trudeau* by will to his wife, the said *Mary Macdonell*."

There was no evidence of any will having been made by *Michael Trudeau*. The presumption from what did appear was, that he died intestate, in which case, by the law of Lower Canada, one-half of this property vested in his widow, the other half in *Mary Trudeau*, their only child.

Judgment.

In 1845 one *Decousse*, having recovered judgment against *Allan Macdonell*, placed in the hands of the sheriff of Montreal a writ against lands, on which the sheriff took in execution the undivided tenth of the house and property which had belonged to *Michael Trudeau*, and sold and conveyed the same to *Pierre Munro*, for £300, and by a judgment of distribution of the court of Queen's Bench, at Montreal, on the 29th January, 1846, *Torrance & Co.* obtained £269 13s. 6d. of the purchase money, by virtue of agreement of 12th July, 1844.

On the 20th January, 1846, *Allan Macdonell*, in consideration of £260, bargained, sold and conveyed to *John Watson Macdonell*, in fee, No. 37, 2nd concession Lochiel, subject to a proviso for redemption, on payment of £250 and interest in a year.

On the 6th September, 1856, *John Watson Macdonell*, in consideration of £180, assigned and conveyed the said mortgage, and the land, &c., to *Donald Alexander Macdonald*, the defendant in this suit.

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On the 30th November, 1855, one *Angus Kennedy* recovered a judgment in the court of Queen's Bench, Upper Canada, for £166 14s. 3d.

On the 6th December, 1854, *John Torrance*, and others, recovered a judgment in the Queen's Bench, Upper Canada, against *Allan Macdonell*, for £995 2s. 2d. On this and on *Kennedy's* judgment writs of execution against the lands of *Allan Macdonell* were put into the hands of the sheriff, who, by virtue thereof, on the 1st April, 1856, executed a conveyance to *Donald Alexander Macdonald*, the defendant, in consideration of £950, of No. 37, 2nd concession Lochiel, as belonging to *Allan Macdonell*, and all the right, title, interest, equity of redemption, &c., &c., in the lot, of the said *Allan Macdonell*.

Judgment.

It further appeared that on the 1st April, 1854, a writ of execution against the goods and lands of *Allan Macdonell*, issued at the suit of *Torrance & Co.*, out of the superior court of the district of Montreal, on a judgment recovered against *Allan Macdonell*, for debt, £923 6s. 1d., with costs and interest, on which the sheriff returned that he had taken in execution, as belonging to the defendant, four-tenths of the lot of ground, (describing it,) being the house and property devised by *Mrs. Macdonell's* will of 17th September, 1828. One of the plaintiffs in that suit bought the premises for £700 currency, and there was a proceeding in the same superior court, in which a judgment of distribution of the proceeds of that execution was rendered on the 30th November, 1854, and the sum of £658 2s. 8d. was awarded to be paid to the three sisters and brother of *Allan*, the devisees of *Mary Macdonell*, their mother. This sum was the amount produced by the sheriff's sale, less the costs and expenses. These four devisees stated, in coming before the court, that the undivided four-tenths sold were their property, but having the right, they made option of claiming the proceeds thereof, and

upon this the judgment of distribution was founded. In fact, the claim was advanced in their name by *Torrance & Co.*, who had previously purchased the right of each devisee for the sum of £35 each. 1864. Macdonald v. Macdonell.

The plaintiff therefore claimed title as devisee of his father *Angus Macdonell* under the will dated the 29th of March, 1842, because, as was admitted at the trial, *John Watson Macdonell*, to whom this lot, No. 37, was in the first instance devised, had exercised the election given him by the 16th paragraph of that will, and had taken instead of No. 37 lot 32, in which event, under the will, No. 37 was devised to the plaintiff, and the plaintiff insisted that although *Allan* had not taken holy orders, or orders of priesthood, yet, inasmuch as he did not "divide or give over in full an equal portion of the house in St. Paul Street, Montreal, as was his mother's intention, as appears by her last will," the codicil to the father's will, which gave *Allan* No. 37 in case he did not take holy orders, became null and void. Judgment.

If the codicil is operative, it revoked the devise of No. 37 to the plaintiff, for in the event of *Allan's* not taking holy orders that lot is given to him (*Allan*) in fee, and the plaintiff's contention is, that the gift became void, even if it vested under the latter part of the codicil.

We have to determine the effect and true construction of this will, for the plaintiff must stand or fall by this. Any reference to the will of *Mary Macdonald* is only incidental, and ancillary to arriving at the true meaning of the will and codicil of *Angus*.

The testator, when he made this will, knew *Allan* had not taken orders, and though he expresses his own wish most earnestly, it is plain he anticipated *Allan* would not do so. Nevertheless, with that knowledge and anticipation, he gives to *Allan* immediately the lot in dispute, and, after making a change in the disposition

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of other portions of his property, rendered necessary solely by this gift to *Allan*, he attaches a condition to that gift which might or might not operate upon it, for the performance of which no time was limited, but which could not be deemed broken before the lapse of a reasonable time to fulfil it.

This condition does not specify any particular act which is required to be done by *Allan*, in order to divide or give over an equal portion of the house in Montreal. If any such act had been directed, and had not been performed, it might well have been insisted that the codicil had become null, and *a fortiori* if any act had been done by *Allan* which defeated his father's intention.

Judgment.

I have arrived at the conclusion that this is a condition subsequent. I content myself with referring to *Clavering* v. *Ellison*, (*a*) and to the authorities collected in the 27th chapter of *Jarman* on Wills.

I think, also, that the true construction of the last paragraph (the third) of the codicil is this: the testator construes his wife's will to have intended that the five children named therein should have an equal share in her Montreal property, and he is apprehensive lest the language of the will, even with the aid of the memorandum endorsed by her executors thereon, might not be sufficient to effectuate that intention. He therefore in effect says, that if *Allan* takes more than one-fifth, or deprives his sisters and brother of the other four-fifths of the Montreal property, he shall not have No. 37. The plain object of the father is to secure an equal division of the Montreal property among the five. He assumes that the power to do so is in *Allan's* hands, and he makes this part of the codicil to secure that result. He certainly never contemplated that the property in

(*a*) 7 H. L. Cs. 707.

Montreal should be equally divided among the five, and also that *Allan* should not take No. 37. 1864.

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But as this condition subsequent would take effect or not, according to the disposition which might ultimately be made of the mother's property devised by her will, it becomes necessary to examine into that part of this case.

The testatrix was a married woman, domiciled in Upper Canada, where she made the will in question, and afterwards died. She was incapable, according to our law, of making a will to pass real estate; but according to the evidence of the advocates, she could make a valid testamentary disposition of her property in Lower Canada, and it is a settled doctrine with us that the *lex loci rei sitæ* is to govern, among other things, as to the capacity of the testator to devise.

If the devise had been legally inoperative, and the estate in Montreal had vested in *Allan*, as eldest son, and heir-at-law of the testatrix, then the condition in the codicil would have made it indispensable for *Allan* to divide and give over an equal portion, or he would not be entitled to keep No. 37. Judgment.

In the opinions given, in this case, in the court below, both the then Chief Justice and Mr. Justice *Burns* express an opinion that the will of *Mrs. Macdonell* is to be construed according to the law of Lower Canada. Sir *J. B. Robinson* says, "the effect of that will upon the estate itself must be settled by the law of Lower Canada;" and again, "We must, no doubt, look to the law of Lower Canada as governing that point," *i.e.*, to whom the interest in the Montreal property passed under that will. And *Burns*, J., though expressing a strong opinion on *Mrs. Macdonell's* will, if it operated on property in Upper Canada would receive a different construction from that given to it by the advocates, adds, "I do not mean to be understood as saying that the will should not be construed as stated was the law

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of Lower Canada, for the property on which it was to operate being there, of course it should be so construed." For present purposes I assume these opinions to be correct, though, perhaps, the generality of language should be qualified by observing that the effect of particular phrases and expressions in a will, as, for example, whether they create a trust, or give an estate for life or in fee, are rather to be decided by the *lex domicilii*, and where the will was made, than by the *lex loci rei sitæ*.

Judgment.

Assuming, as I have said, that the construction is to be by the law of Lower Canada, we have abundant evidence of that construction, and that each of the five children named in the will was entitled to and took an equal share. Besides the testimony of the advocates, there is the judgment of distribution of the court in Montreal, in the suit of *Decousse* v. *Macdonell*, in which one undivided tenth of the whole property was sold on an execution against *Allan Macdonell*, who had, "as proprietor," under the last will and testament of his mother, mortgaged the property bequeathed by the will. The court adjudged to *Allan's* mortgagee the nett proceeds of the tenth that was sold. There is further the judgment of distribution of the same court, in the cause of *Torrance et al.* v. *Allan Macdonell*, founded on the claims of the sisters and brother of *Allan*, each to an undivided tenth of the property described in their mother's will, deciding in favour of their claims, and so affirming the previous adjudication which affected one-tenth only as belonging to *Allan*. These judgments shew that *Allan*, and his brother and sisters, did each of them obtain an equal portion, and that such portion was adjudged as the right of each, derived under the mother's will. It is quite true that *John* and the three sisters appear to have sold their rights for a price very small in comparison with what *Allan's* share produced at sheriff's sale, or with the sum for which *Torrance & Co.* (to one of whom they had sold) became purchasers at the sheriff's sale; but it is not established that *Allan*

in any way caused this apparent inadequacy of price; it certainly may have arisen from causes with which he had no connexion. 1864. Macdonald v. Macdonell.

So far, therefore, as the law of Lower Canada is concerned, it seems conclusively established that the will of *Mary Macdonell* did as effectually vest equally in *Allan*, *John*, and their three sisters, the house, &c., in St. Paul Street, Montreal, as any act of *Allan's* could have vested it, and therefore, that the intention of the father, as expressed in the codicil, has been effectually attained.

Under these circumstances I do not think we can properly hold that the devise of lot No. 37 to *Allan* has been defeated by breaking the condition subsequent, and so giving effect to the devise over. If the estate passed by the mother's will, so that no act of *Allan's* could alter the disposition, then his not literally following the clause of his father's will as to dividing, was only abstaining from some inoperative act, and I have seen no authority which makes that a ground of forfeiture. He cannot be said to have done any prohibited act, for the codicil contains no prohibition. Judgment.

There are many cases in which, where a party who takes under a will subject to a condition that he shall not do a certain act, on pain of forfeiting that which is given, incurs the forfeiture by doing the prohibited act directly, or by doing some other act which in the end brings about the same result. And so it will be where the gift is conditional on the performance of a specified act, if that act is not performed within the time limited, where a time is limited, or if performance be refused on request by some one interested in it, the forfeiture will take place. But it appears to me to be going beyond any decided case to hold, that where the substantial object of a condition has been attained, where nothing has been refused to be done which was requisite, in

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order to attain such object, and where nothing has been done which, so far as we can see, could have defeated the object, a forfeiture shall, nevertheless, be adjudged to have taken place, because the devisee has omitted to do some act, not particularly expressed, to effectuate an intention of the devisor, which, by mere operation of law, and without any thing done by the devisee has been completely fulfilled. Such a construction would be to defeat the object and intent of the testator by a literal adherence to the general language, and the heir-at-law, to whom the father actually gave No. 37, would be disinherited, and the gift defeated, because he had not done something which, as is shewn, would have been an act of supererogation.

I have examined all the cases referred to by the late Chief Justice. In *Cleaver* v. *Spurling* (*a*) one act was prohibited, another (the giving a release) was required. The former act was done, the latter omitted, and it was held a forfeiture was incurred. So in *Doe* v. *Hawke.* (*b*) So also in *Webb* v. *Webb*, (*c*) and in *Macnamara* v. *Jones.* (*d*)

Judgment.

In *Boughton* v. *Boughton* (*e*) a legacy was given to the heir on the express condition that he should not dispute the disposition of the reality made by the will, which was not properly attested so as to pass real estate. It was held that the heir must elect whether he would take the legacy or the real estate, but that he could not have both.

In *Southey* v. *Lord Somerville* (*f*) the testator had assumed to devise an estate, over which he had no disposing power, and two other parcels of land, which were his own, which should be possessed and enjoyed by and with the first mentioned estate, and that in case the

(*a*) 2 P. W. 526.
(*b*) 2 East, 481.
(*c*) 1 P. Wms. 182.
(*d*) 1 Br. Ch. Ca. 481.
(*e*) 2 Ves. 12.
(*f*) 13 Ves. 486.

devisee did not dwell in the mansion house, on the first mentioned estate, after he should arrive at the age of twenty-one, then he gave it over; and in a codicil he repeated that it was his will and intention that the two other parcels of land should be held and enjoyed by the person or persons to whom he had, by his will, given the first mentioned house and estate. The devisee became entitled to that house and estate *alio jure*, but did not dwell in the mansion house for some years after he came of age. Lord *Eldon* held that the devisee could not take the two smaller parcels, observing that he must look to what the testator had directed, not to what may have been his intention, supposing himself to have been acquainted with all that was in the testator's mind, and finding this positive provision in the will, he held that the two fields must pass away from the devisee, though the principal estate, "which, if it had been subject to the testator's will, would have also passed away" from the devisee, he had *alio jure* under his own father. I presume the "positive provision" means residence after attaining twenty-one years of age, as I find no other condition which would have deprived the devisee of the principal estate if it could have passed by the devise. But the case, though stronger, in my opinion, than any of those cited in the court below, is easily distinguishable, for a specific act was directed, which was not performed, nor was the direction one, the intent of which could have been reached except by the act of the devisee himself.

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On the whole, I am of opinion the judgment should be reversed, and the *postea* be delivered to the appellants.

VANKOUGHNET, C.—I concur in the learned opinion which has just been delivered. I desire merely to add to what has been said by the learned Chief Justice—that the taking by *Allan* of the whole of the rents and profits, to a share of which, by the law of Lower Canada, his sisters and brother were, as I assume,

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entitled without any deed from him, does not, in my opinion, alter his position or affect his rights under his father's will. There is no clause of forfeiture in case he should wrongfully take the rents or not pay over to his sisters and brother their share of what he might rightfully have collected. I suppose it was convenient that some one of those entitled should receive the rents and then divide them. The sisters and brother must be supposed to have known, at all events could have ascertained their rights, and compelled *Allan* to pay them their shares, or compelled the tenants to do so. Suppose a deed from *Allan* had been necessary to give title to his sisters and brother, and after executing it, he received and kept their proportions of the rents, would he then have forfeited the devise to him under the codicil? and yet this act would have been equally wrongful with what he did.

Judgment.

ESTEN, V. C.—Lot 37, the land in question, was devised by the testator, *Angus Macdonell*, to his son *John Watson*, in fee, with a proviso that if he chose lot 32 instead, lot 37 was to go to his son *Alexander Roderick*. By the codicil it was provided, that if his son *Allan* should not enter into holy orders, he should have lot 37, provided that if he should not divide and give over in full an equal portion of the house on St. Paul Street, Montreal, as was his mother's intention, as appears by her last will, the codicil should be void. It is admitted that lot 37 vested in *Allan*, he not having entered into holy orders, and the only question is whether there has been a breach of the condition as to the house and property in Montreal, in which case the will has been re-established. It is no doubt a condition subsequent to defeat an estate, and must be strictly construed. The testator had, fourteen years before, expressed an opinion on the meaning of his wife's will, but in 1842 considered that *Allan* still had an opportunity of performing this trust. He evidently intended the will of his wife to be performed, whatever his own

opinion as to its meaning might be. This will must, I apprehend, be construed according to the law of Upper Canada, at least, such, I apprehend, is the law of Upper Canada, and I presume of Lower Canada; construed according to the law of Lower Canada, it appears that estates immediately pass to the sisters and brothers without the necessity of the intervention of a conveyance; construed according to the law of Upper Canada, the estate seems to pass to *Allan* in the first instance, who is bound to convey four-fifths to his sisters and brother, and to account to them for the rents and profits of them. It seems to me that the will of Mrs. *Macdonell* did not prescribe any act to be done by *Allan*, the neglect of which would be a breach of a condition at law, under her husband's will, considered as only directing the performance of her will. She devised the estate to him, "with power to give an equal portion to his sisters and brother." They may be entitled to have him declared a trustee of four-fifths of the estate for them in equity, and compel him there to account for the rents and profits, but they would have no remedy at law. If the estate had been situate in Upper Canada, they would have been entitled to the relief in equity I have mentioned, and no doubt the jurisdiction of the courts in Lower Canada was sufficient to reach the case; but we constitute on the present occasion a court of law, not a court of equity. The question we have to decide is, who is entitled to succeed in ejectment? and to entitle the plaintiff in the action to our judgment it must appear that the estate vested in *Allan* has become divested. It could only have become divested by means of a breach of the condition contained in *Angus Macdonell's* will, and we must be satisfied that there has been a breach of condition which a court of law can recognise. Now, although *Angus Macdonell* had at a very early period formed an opinion as to the meaning of his wife's will, and although he might have had some positive act in view to be done by *Allan* when he made the devise of the lot in question to him, yet undoubtedly

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it may be argued that he merely meant that he should perform his mother's will according to her real intention, and that we cannot recognise any breach of condition which is to divest *Allan's* estate at law, unless we can be satisfied that his mother's will direct some act to be done, the neglect of which would constitute a breach of the condition contained in his father's will. The mother's will certainly directs no act to be done, and according, therefore, to this reasoning, we could not recognise any breach of condition which would divest *Allan's* estate. I confess that this reasoning has great force in my mind, and considering the doctrine that conditions divesting estates are to be strictly construed, I was strongly inclined to this view of the case, but on consideration, I think the will of *Angus Macdonell* is sufficiently plain. It is true that Mrs. *Macdonell's* will is not imperative, but merely enabling, but then her intention is clear that *Allan* should divide the property. This he had not done up to 1842, when his father's will was made. Now the father says in his will that he has given this estate to *Allan*, on condition that he do that which his mother intended and enabled him to do, but he had not yet done. The words in the two wills are equipollent. The mother enables "him to give" to his sisters and brother an equal share, which implies division; the father uses the words "divide and give," and in effect says that if he does not "divide and give," as his mother intended he "should, he shall forfeit the estate." The only question then is whether *Allan* has "divided and given," as he was enabled to do by his mother's will, and as she intended. The facts appear to be that the rents were divided amongst the devisees until the father's death. *Allan* says in his evidence that he drew the rents from his father's death, from which I infer that they were properly distributed previously to that time, inasmuch as the executors had given it as their opinion that they were all equally entitled. The condition might embrace the occupation, the rents, and the conveyance of the estate, in other words, if

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Allan permitted them to occupy the estate, or if he conveyed four-fifths of the estate to the other devisees, he certainly would have performed the condition. But it does not follow that the omission of any of these acts would amount to a breach of the condition. The sole occupation of *Allan* would probably be immaterial: five families could not well occupy one home. The omission to convey might, under the circumstances, be contended to be immaterial. It is clear that, according to the construction put upon Mrs. *Macdonell's* will in Lower Canada, it was considered that immediate estates passed to *John* and his sisters without the intervention of a conveyance. Whether this was a correct construction of the will according to the law of Upper Canada may be doubted, because I apprehend that according to the law of Lower Canada the construction of the will should be governed by the *lex domicilii*, that is in this instance by the law of Upper Canada, and according to that law I apprehend the construction would be different. It might, however, have been taken for granted on all sides that the conveyance was unnecessary, and it may be contended with some shew of reason that it ought to be deemed to have been waived. If a conveyance had been necessary it ought to have been executed within a reasonable time after the mother's death in 1828, or after *Allan* had attained his full age, which took place in 1839; but at the date of the father's will, fourteen years had elapsed from the mother's death and three years from *Allan's* arrival at majority, and no conveyance had been executed or required. It may be contended that under these circumstances it must be deemed to have been considered unnecessary, and that the father did not intend or direct by his will that a conveyance should be executed: of this, however, I think there is no sufficient evidence. With regard to the rents the case is much stronger. The rents I think must be deemed to have been distributed up to the father's death. *Allan's* evidence shews that he only drew the whole of them from that time; the surviving executors had given it as their opinion that they

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should be divided, and had ordered distribution accordingly, and we must suppose that *Angus* had acted up to this determination. I think, therefore, he must have intended *Allan* to continue that distribution, and when he said in the codicil to his will that if *Allan* "should not divide or give over in full an equal portion," it was equivalent to saying that if he should not divide the rents equally amongst his sisters, brother, and himself, in this event his estate was to cease, and the land in question was to go to *John Watson* or *Alexander Roderick*, as the case might be. It is clear that the testator considered that *Allan* would have power to divide or not to divide: that he had the estate vested in him, or some control over the property; and he intended that he should voluntarily and without legal proceedings divide the estate or the rents amongst himself and his brother and sisters. It is immaterial in this view whether the estate vested wholly in *Allan*, subject to a trust for division, or vested in all the children equally. In other words, whether the will is to be construed according to the law of Upper or Lower Canada. In either case the condition has been broken. *Allan* certainly had the control which the testator evidently considered that he would have, and respecting which he enjoined him to make a voluntary distribution of the rents. This injunction he violated by taking the rents to himself. It is clear that *Allan* did not divide the rents as his father intended. He drew them for his own use from his father's death; and I think it must be intended that he continued to do so until the sale of the four-tenths to *John Torrance & Co.*, in 1850. The event therefore happened on which the conditional limitation was to take effect. In short, I consider that lot 37 was devised to *Allan Macdonell* in fee subject to a conditional limitation in favour of *John Watson* or *Alexander Roderick*, as the case might be in case he should not "divide and give" over an equal share of the property in Montreal to his sisters and brother according to the intention of his mother's will. I think he

Judgment.

did not so divide and give according to the intention of his father's will, and therefore that his estate has ceased, and the land in question become vested in the plaintiff, who is therefore entitled to judgment in this action. The case was argued with much ability, and for some time I inclined in favour of the defendant in the action, but on reflection I am satisfied that the judgment of the court below is right, and ought to be affirmed. It was argued by Mr. *Richards* that *Allan*, being entitled as heir-at-law to lot 37, the land in question, in the absence of a will it is necessary to shew he had notice of what he was bound to perform before he can be disinherited. Such appears to be the rule according to the case of *Doe d. Taylor* v. *Crisp*, (*a*) and the rule appears to apply equally to conditions and conditional limitations. But it would seem that knowledge on the part of the heir is sufficient, and that a formal notification on the part of the party entitled on breach of the condition is unnecessary. Such knowledge may be inferred from the circumstances of the case, and in the present instance, if we are at liberty to do so, I think we must infer that *Allan* had notice of the will of his father from the time of his death. He was entitled as heir-at-law in the absence of a will, to all the lands to which his father was entitled, but he never claimed any but lot 37, the land in question; of lots 32 and 31, the other brothers have been confessedly in possession ever since their father's death. I think it must be intended that *Allan* did not claim the other lands because he had notice of the will, and of the devise contained in it of those lands in favour of his brothers, and that he had such knowledge from the time of his father's death, as he never made any claim to those lands.

1864.

Macdonald v. Macdonell.

Judgment.

(*a*) 8 A. & E. 779.

1863.

[*Before the Hon. Sir J. B. Robinson, Bart., President, the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. H. Draper, C. B., C. J., the Hon. V. C. Esten, the Hon. Mr. Justice Richards, the Hon. Mr. Justice Hagarty and the Hon. Mr. Justice Morrison.*]

ON AN APPEAL FROM THE COURT OF CHANCERY.

FREEMAN v. THE BANK OF UPPER CANADA.*

A., on the 2nd of February, 1857, created a mortgage of real estate in favour of B. which was duly registered on the 11th of July following. B., by an endorsement on the mortgage, assigned the same to C.; subsequently a judgment was recovered against B., which was duly registered, after which C. registered the assignment of mortgage to himself. *Held*, affirming the judgment of the court below, that the judgment, by reason of such prior registration, had priority over the assignment to C., which, by reason of such non-registration, was void as against the judgment creditor.

Statement.

The bill in the court below was filed by the *The Bank of Upper Canada* against *Levi Potroff*, *Lewis Birely Freeman*, *Peter James Gage* and *William Freeman*, setting forth that on the 2nd day of February, 1857, *Potroff* executed a mortgage on certain lands in the county of Wentworth, in favour of the defendant, *Lewis B. Freeman*, to secure the sum of £750, which was duly registered on the 11th of July following: that on the 30th of June, in the same year, *Lewis B. Freeman* assigned the mortgage to the defendant *William Freeman*, which assignment was registered on the second day of December following.

That on the 29th day of September in the same year, (1857,) the bank recovered a judgment in one of her Majesty's superior courts of law at Toronto, against the defendants, *Lewis B. Freeman* and *Gage*, for £610 2s. 11d., damages and costs, which judgment was duly entered up of record, and registered in the said county of Wentworth on the same day: that a *fi. fa.* goods, issued

* The judgment in this case was mislaid, so that it could not be reported in its proper place.

on said judgment, had been returned *nulla bona*, and by reason thereof the bank submitted they had acquired a lien on the interest of *Lewis B. Freeman*, in and under such mortgage, prior to any interest acquired by *William Freeman* in said mortgage, by virtue of the assignment thereof to him: that the moneys secured by the mortgage were wholly due and unpaid: that the defendant *Potroff* had been notified of the claim of the bank under their judgment, requiring him to pay the bank, and not to pay any other person.

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The prayer of the bill was, that the plaintiffs might be declared entitled to the benefit of such mortgage prior to *William Freeman*, and to have the moneys secured thereby applied in the first place towards satisfaction of their judgment and the costs of the suit: that the necessary accounts might be taken: that the amount found due might be paid, or in default of payment foreclosure.

Statement.

The evidence in the cause verified substantially the statements in the bill. *Potroff* and *Gage* allowed the bill to be taken *pro confesso* against them; and the court declared the bank entitled under their judgment to the benefit of the mortgage in preference to *William Freeman*, as the assignee thereof, and to have a sufficient part of the moneys secured thereby applied in satisfaction of such judgment; directed the usual accounts to be taken, and in default of payment a sale of the mortgage premises.

From this decree the defendant *William Freeman* appealed, on the following grounds:—

1st. Because upon the whole case the appellant had acquired an exclusive right to the mortgage and the money secured thereby, in preference to the respondents, the *Bank of Upper Canada*, and the bill ought to have been dismissed.

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Freeman v. Bank U. C.

2nd. Because by the registration of the judgment of the respondents, the *Bank of Upper Canada*, before the registration of the assignment of the mortgage in the pleadings mentioned, the respondents, the *Bank of Upper Canada*, acquired no right to the benefit of the mortgage in preference to the appellant.

3rd. Because the registered judgment of the respondents, the *Bank of Upper Canada*, bound only the equitable interest of the respondent, *Lewis Birely Freeman*, in the said mortgage, and the money secured thereby at the time of the registration thereof, and that the said *Lewis Birely Freeman* having long before, and prior to the recovery of the judgment, assigned the said mortgage and all his interest therein, absolutely, for a valuable consideration and *bona fide* to the appellant, the judgment did not attach at all upon it.

Statement.

The respondents, the *Bank of Upper Canada*, contended they were entitled to retain the decree pronounced, on the ground, that by effect of the registry laws in force at the time of the several matters in the pleadings mentioned, the appellant's title to the mortgage in question, under the assignment thereof to him, was postponed to that of the *Bank of Upper Canada*, by virtue of the subsequent judgment recovered by them against the mortgagee, *Lewis Birely Freeman*, the said judgment having been duly registered in the county wherein the mortgaged premises were situate before the assignment was registered.

Potroff also desired that the decree should be reversed or varied to the extent and for the reasons assigned by the appellant.

Mr. *Proudfoot* for the appellant. The effect of the proviso in the third section of 13 & 14 Victoria, ch. 63, was to render liable for sale only such property as belonged to the debtor. In this case, the property in

the mortgage had ceased to belong to *Lewis B. Freeman* long before the bank recovered the judgment under which they now claim to have priority over the appellant: referring to *McMaster* v. *Phipps*, (*a*) *Beavan* v. *Lord Oxford*, (*b*) *Hawkins* v. *Gathercole*, (*c*) *Sugden's Vendors and Purchasers*, 424-427. 1863. Freeman v. Bank U. C.

Mr. Brough, Q. C., for the respondents, the *Bank of Upper Canada*. The fact of the judgment being registered renders the prior unregistered conveyance void as against the judgment creditor, and the property embraced in such unregistered conveyance from thence forward is treated as belonging to the debtor until the judgment is satisfied. He cited, amongst other cases, *Latouche* v. *Dunsany*. (*d*)

The judgment of the court was delivered by

VANKOUGHNET, C.—This case rests within narrow limits. The defendant, *Lewis B. Freeman*, having a mortgage of certain premises as security to him for £750, assigned the mortgage by deed poll endorsed thereon, on the 30th of June, 1857, to the defendant *William Freeman*. The mortgage was registered, but the assignment of it never was. On the 29th of September, 1857, the plaintiffs, the respondents here, recovered a judgment against the defendant *Lewis B. Freeman*, the mortgagee, and caused the same to be duly registered on the same day in the county where the mortgaged lands lie. The plaintiffs file their bill to have this mortgage security realised to pay off this mortgage debt, claiming that by virtue of the registration they have fastened their judgment upon it as the property of *Lewis B. Freeman*. Hard as it may appear, that one man's property should be taken to pay another man's debt, yet I see no means of escape from the operation of section 3 of the statute 13 and 14 Judgment.

(*a*) 5 Gr. Ch. R. 253.
(*b*) C. D. M. & G.
(*c*) 5 D. M. & G. 1.
(*d*) 1 Sch. & L. 137.

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Victoria, chapter 63, or of the sections 2 and 3 combined. Under section 261 of chapter 22, Consolidated Statutes of Upper Canada, the sheriff might upon a writ of *fi. fa.* against goods, have seized this mortgage, (putting the assignment out of sight for the moment,) and proceeded to enforce payment of it. The plaintiff could of course have execution of it in equity, and the only obstacle offered is the assignment of it. But under section three of the 13 & 14 Victoria, chapter 63, we must, as against the plaintiffs' registered judgment, hold that this assignment is void, or non-existent; for the language of the act is, "that every deed," &c., "whereby any lands," &c., "may be in any wise affected in law or in equity shall be adjudged fraudulent and void, not only against any subsequent purchaser or mortgagee for valuable consideration, but *also against a subsequent judgment creditor*, who shall have registered," &c. This language is too explicit to be evaded, though I confess I have sought, but in vain, for some distinction on which to withdraw this case from it. I have considered the opinion expressed by my brother *Spragge* in *McMaster* v. *Phipps*, but I think we would not be warranted in putting upon the languge of the act the narrow construction which he there aseribes to it, consistent as that would be with all our previous notions as to the rights of judgment creditors. Were that construction to prevail, the third section so far as it relates to registered judgments would be inoperative, because the second section amply provides for all cases of transfer subsequent to the registration of the judgment. In answer to the plea of hardship, it may be said that the policy of the legislature in enforcing registration was known alike to all, and machinery provided by which each one might secure his title. The provision may be arbitrary, but so are all acts of parliament, from the Statute of Frauds down, and he who neglects to observe them has only himself to blame.

Judgment.

Mr. *Proudfoot* contended, that he came within the

provisions of the second section, and was entitled to protection as a purchaser for valuable consideration without notice. This provision appears to have been literally copied into our act from section thirteen of the 1 & 2 Victoria, chapter 110, without regard to the distinction between the two acts. In the English act it is a provision of great importance. Under our act I do not now see under what set of circumstances it can be used. It cannot apply to a case of a transfer, before that has arisen which, upon registration thereof, is to affect such transfer, for not only would it be absurd for the legislature to provide against notice of that which did not exist, but the third section of the act expressly avoids such transfers by the prior registration of deeds or judgments subsequently created. It cannot relate to a transfer executed subsequently to registration, for the same act provides that such registration shall in equity constitute notice. When then can this provision apply?

1863.

Freeman v. Bank U. C.

Judgment.

The appeal must be dismissed with costs.

1864.

Ganton v. Size.

[*Before the Hon. Arch. McLean, Ex-C.J., President,* the Hon. William H. Draper, C. B., C. J., the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. B. Richards, C. J. C. P., the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Hagarty, and the Hon. Mr. Justice Adam Wilson.*]

ON APPEAL FROM THE COURT OF QUEEN'S BENCH.

BENJAMIN GANTON, EXECUTOR OF STEPHEN GANTON, THE ELDER, APPELLANT, AND JOHN SIZE AND ANNIE SIZE, HIS WIFE, EXECUTRIX OF STEPHEN GANTON, THE YOUNGER, RESPONDENTS.

In an action by an executor for money lent and advanced by his testator, the evidence of indebtedness consisted of a receipt, signed by the testator, and found amongst his papers in the words following:—"*Received from my son S. G., the sum of forty-eight dollars for interest of* £300 *at four per cent. due the 1st day of May next, according to agreement, which I cannot find, so I have put the receipt on this paper.*" *Held*, affirming the judgment of the court below, that this was not admissible as evidence against the estate of S. G., the same not being an entry against the interest of the party making it.

Statement.

This was an appeal from the judgment of the Court of Queen's Bench, making absolute a rule for a new trial on the grounds stated on the judgment, as reported in the reports of that court, volume xxii., page 473, where the facts giving rise to the action and the evidence given are very fully set forth.

From that decision the plaintiff appealed, assigning as reasons against the judgment,

1st. That the receipt made by the testator and found amongst his papers was properly received as evidence, and improperly rejected by the judgment of the court.

2nd. That the plaintiff had established his cause of action, and is entitled to hold his verdict.

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* Was absent when judgment was pronounced.

The respondents alleged that the receipt was improperly admitted as evidence, and the judgment of the court deciding that it ought to have been rejected is right. 1874. Ganton v. Sise.

Mr. *J. Hillyard Cameron*, Q. C., and Mr. *C. Robinson*, Q. C., for appellant.

McMichael for respondents.

In addition to the authorities cited in the court below, counsel referred to and commented on *Corser* v. *Orrett*, (*a*) *Regina* v. *The Overseers of Birmingham*, (*b*) *Shortt* v. *Lee*, (*c*) *Robson* v. *Rolls*, (*d*) *Outram* v. *Morewood*, (*e*) *Stead* v. *Heaton*, (*f*) *The Mayor, &c., of Exeter* v. *Warren*, (*g*) *Taylor on Evidence*, 3*rd ed.*, 1492.

The judgment of the court was delivered by

Judgment.

DRAPER, C. J.—*Higham* v. *Ridgway* is justly regarded as the leading case on which rests the doctrine, that entries made by a party against his own interest are evidence of other facts stated in such entries, in cases between third parties, after the death of the person by whom such entries were made.

This doctrine has been much canvassed, but it has been upheld to the full extent to which *Higham* v. *Ridgway* carries it: occasionally it has been a little extended, at least by dicta of the judges. On the other hand, we find judges expressing themselves against such extension, as in *Doe* v. *Vowles*, (*h*) where *Littledale*, J., said, "the cases have gone far enough," and by *Williams*, J., in *Doe* v. *Reviss*, (*i*) who uses a similar expression in commenting upon *Davies* v. *Humphries*, (*j*) and to some extent by *Erle*, J., in *Papendick* v. *Bridgwater*, as reported in 1 Jurist N. S. 657.

(*a*) 21 Beav. 52.
(*b*) 1 Best & S. 763.
(*c*) 2 Jac. & W., at p. 488.
(*d*) 1 M. & Rob. 239.
(*e*) 5 T. R. 121.
(*f*) 4 T. R. 669.
(*g*) 5 Q. B. 773.
(*h*) 1 Moo. & Rob. 261.
(*i*) 7 C. B. 514.
(*j*) 6 M. & W. 153.

1864.

Ganton v. Silse.

I accept without reserve what I understand that case to decide, in fact as it is condensed in the marginal note, "If a person have peculiar means of knowing a fact, and make a written entry of that fact, which is against his interest at the time, it" (the entry) "is evidence of the fact as between third persons after his death." In giving judgment in that case, Lord *Ellenborough* says: "The entry made by the party was to his own immediate prejudice, when he had not only no interest to make it if it were not true, but he had an interest the other way not to discharge a claim, which it appeared from other evidence he had."

Perhaps the most concise and accurate statement of the principle is that given by Sir *Thomas Plumer*, M. R., in *Shortt* v. *Lee:* "The entry is made by an individual conusant of the fact, *at a time when it was not in dispute, having no interest to make a false entry,* and making one to charge himself," and at page 476, "in cases of this kind the question must be whether circumstances are not presented, excluding the probability of it being a false representation of the *res gestæ*."

Judgment.

Now in the present case the entry or paper writing is not offered as evidence of the fact "as between *third persons*."

The plaintiff is the personal representative of *Stephen Ganton*, the elder, the person by whom this paper was written, and in whose book it was found wafered after his death. The defendant is the personal representative of *Stephen Ganton*, the younger. The plaintiff, as such personal representative of the father, offers this paper to prove that the son was indebted to the father. I do not think the parties to this suit can be deemed third parties within the meaning of *Higham* v. *Ridgway*.

Then, although the entry, by admitting a payment of forty-eight dollars made by the son to the father,

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is an entry against the father's interest, yet the words which are relied upon to prove the plaintiff's case "for interest of £300, at four per cent., due the 1st of May next, according to agreement," form part of the same statement, and are as clearly for the father's interest as the admission of receiving $48 is against it. And more than that, the concluding words of the receipt, "which I cannot find, so I have put the receipt on this paper," shew to my mind conclusively, that the entry as a whole was made expressly to serve and maintain the interests of the party who made it. Again, though this receipt bears date on the 28th of April, 1861, during the life of *Stephen*, the son, who died on the 15th of June of that year, there was not a shadow of proof that it was written during the son's life, and *John Ganton*, who at the request of the father, then an invalid, searched among his papers and found this writing wafered in a book, states, "the object of my search was to find a memorandum *upon which a suit was then pending between the old man and defendants.*" *James Kellar* also states, that the father said there was a suit going on about this £300 after the son's death. In the judgment in the court below it is said the plaintiff was nonsuited. Under these circumstances, it is to my mind exceedingly doubtful whether this writing was made when "the fact was not in dispute," nor can I even say that such circumstances are presented as to exclude "the probability of its being a false representation of the *res gestæ*."

Judgment.

It was, however, argued that the evidence given for the defence made this paper admissible by way of reply or rebuttal, and if it was admissible for any purpose then there should have been no new trial, and this appeal should be allowed. The defence was not based on a denial that *Stephen*, the son, had received £300 from his father, the question was, upon what terms, as to re-payment more especially, and the defence was that the principal was to become *Stephen's*, provided he paid

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Ganton v. Rise.

his father four per cent. during his (the father's) lifetime. But in this defence, and in the evidence given to sustain it, I find nothing to affect the question of the admissibility of this writing as evidence for the plaintiff.

It is also to be remembered, in connexion with the question whether the circumstances do or do not exclude the probability of this writing being a false representation of the *res gestæ*, that it purports on the face of it to be a receipt for money paid by the son to his father. The debtor who pays is under ordinary circumstances the party who obtains and keeps the acknowledgment of payment. Had this paper been found among the papers of the son, it would have raised a very different question, but it comes from the custody of the father's representative, and its existence is only shewn *post litem motam*.

Judgment.

I think it unnecessary to do more than advert to the opening to fraud and unfounded claims, to which such an extension of the principle of *Higham* v. *Ridgway* would give rise, as for the other reasons given, I am of opinion this appeal should be dismissed.

ON APPEAL FROM THE COURT OF COMMON PLEAS. 1864.

SAMUEL DICKSON, APPELLANT,
AND
JOHN H. AUSTIN, RESPONDENT.

Lessee of mill—Riparian proprietor—Pleading.

The lessee of a mill situate near to a river and driven by water drawn in a channel from it, sued for damages sustained by him by reason of the obstruction of the flow of the stream caused by the defendant throwing slabs and other waste stuff into the stream, and thereby obstructing the flow of water into the channel aforesaid. The lessor of the plaintiff was the owner of the land adjoining the stream, and also of the land surrounding the pond used for the working of the mill.

Held, affirming the judgment of the court below, that the lessee had a right to maintain such action; and that the declaration stating the plaintiff to be possessed of land and premises *near to* the river, and as such entitled to the use of the stream for the working of his mill, was sufficient.

This was an appeal from a judgment of the Court of Common Pleas, refusing a nonsuit in a cause pending in that court wherein the respondent was plaintiff and the appellant was defendant. The case is reported in the eleventh volume of the reports of that court where the pleadings and evidence are so fully set forth as to render any statement of them here unnecessary. Statement.

From that judgment the defendant in the action appealed on the following, amongst other, grounds:

First.—That it was not proven at the trial that the plaintiff was possessed of lands and premises adjacent and near to the river Otonabee which gave him the right to have and enjoy the benefit of the waters of that river for the purpose of working his mills being upon the said lands and premises.

Second.—That it was not proven at the trial that the plaintiff was possessed of lands and premises adjacent and near to the river Otonabee, which entitled him to the use and flow of the stream for the benefit and enjoyment of the said lands with the appurtenances.

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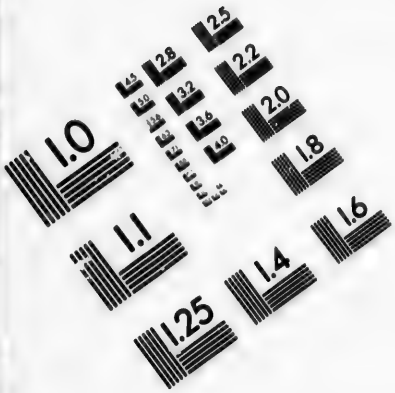

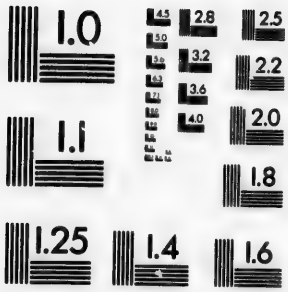

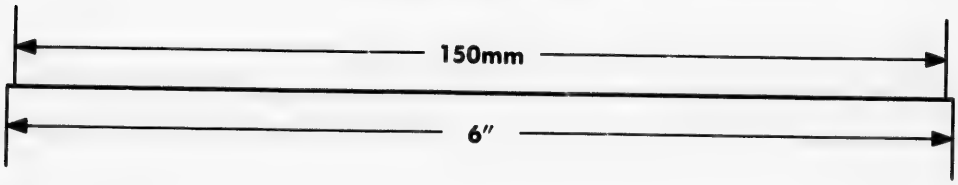

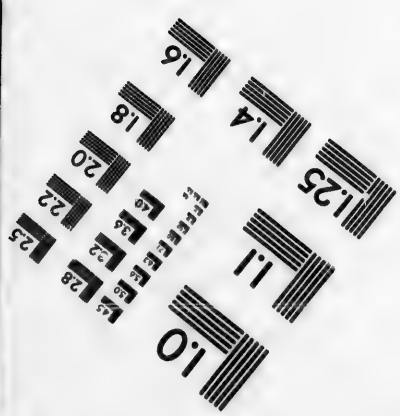

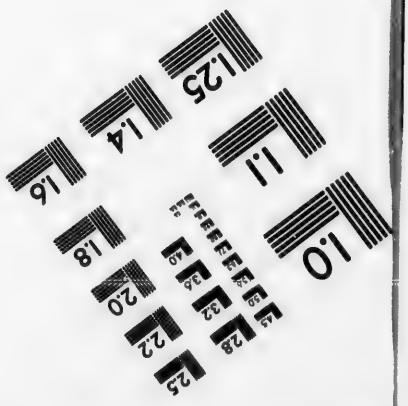

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Dickson v. Austin.

Third.—That the title which the plaintiff proved he had under the lease from *Robert David Rogers* to the plaintiff and *Jacob Vanalstine*, and under the memorandum of agreement made between the plaintiff and *Vanalstine*, was not such a title as entitled the plaintiff to a verdict on the issues raised by the defendant in his second and third pleas; and the right of the plaintiff under such lease and agreement being but a limited right, and for a limited period, and being but a lease only, it was necessary for him if he claimed to recover in respect thereof to set the same forth and how conferred, and he had no right to avail himself of the title and right of said *Rogers* as a riparian proprietor to entitle him to recover under the allegations in the declaration and the issues raised thereon.

Fourth.—That the evidence at the trial was such as entitled the appellant to have had his rule *nisi* to enter a nonsuit made absolute.

Statement.

The plaintiff contended that the judgment was correct and ought to be affirmed for the reasons following:

First.—Because the respondent, by virtue of the lease from *Robert David Rogers* to him and one *Jacob Vanalstine*, and the assignment from *Vanalstine* to the respondent, became entitled to all the rights and privileges of the said *Robert David Rogers* as a riparian proprietor in the use and enjoyment of the waters of the river Otonabee, for the purpose of working the mills demised to the respondent.

Second.—Because by virtue of the possessory right acquired under the said lease from the said *Rogers* the respondent became entitled to the enjoyment of the waters aforesaid; and it is in respect of such possessory right that the allegations of the declaration in that behalf are to be understood.

Third.—Because, whenever a possessory right is pre-

judiced or affected, it is unnecessary, so far at least as a wrong-doer is concerned, to set forth the manner in which the same is derived with any particularity; and any general allegation and proof of possession is sufficient to sustain the action. 1864. Dickson v. Austin.

Fourth.—Because the duration or limitation of the defendant's right of possession is only an element in the computation of damages, and cannot affect his right of action.

Fifth.—Because, during the existence of the lease to the respondent the said *Robert David Rogers* could not have maintained any action against the now appellant, save in respect of his reversionary interest, and the right therefore to sue for the intervening injury to the possession must be in his lessee, the now respondent.

Sixth.—Because the injury complained of is in violation of the provisions of the Consolidated Statutes of Upper Canada, chapter 47, (page 454,) section 284. Statement.

Mr. *Read*, Q. C.. for the appellant, referred to *Austin* v. *Snider*. (*a*) It is shewn that *Rogers*, when erecting his mill, constructed the dam in such a manner that the slabs were prevented from flowing down the stream, which they would have certainly done if left to the natural influence of the water.

The mill of the respondent is built at such a distance from the river that it cannot be said that this is a reasonable use of the water. *Shears* v. *Wood*, (*b*) *Moore* v. *The Earl of Plymouth*; (*c*) and *Bird* v. *Randall* (*d*) shews that a party having once received compensation for a wrong complained of is precluded from seeking damages at the hands of another.

In this case, *Austin* must be looked upon as the

(*a*) 21 U. C. Q. B. 299.
(*b*) 7 J. B. Moore, 345.
(*c*) 8 B. & Ad. 66.
(*d*) 8 Burr. 1345.

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author of his own mischief, as by the improper mode of constructing the pond and raceway adopted by him the slabs and refuse are drawn into them.

He also contended that *Austin*, under the averments in his declaration, was bound to shew that he was a riparian proprietor, which he failed to do, the fact being that land intervenes between him and the bank of the stream. *Fentiman* v. *Smith*. (*a*)

Austin in his declaration alleges his right to the use of the water to be by virtue of his possession. The fact as proved is, that he claims by virtue of the grant: claiming under a lease he ought to have set it out and not asserted a claim as proprietor. The right to the water in this case is personal, not appurtenant to the mill. An assignment of the mill would not carry as appurtenant a right to the water. In *Northam* v. *Harley*,(*b*) cited in the court below, the right was appurtenant, which is sufficient for the explanation of that case. In such a case where all claim under the same deed it is sufficient to allege title by possession as against such parties. *Embrey* v. *Owen*. (*c*)

Statement.

Mr. *A. Crooks*, Q. C., for the respondent.

If the argument of the other side be acquiesced in it would shew that *Rogers* never had any right to construct the pond and raceway; but the law would appear to be different as enunciated by Lord *Kingsdown* in *Miner* v. *Gilmour*. (*d*) *Rogers*, if in possession of and working this mill, could certainly have maintained this action, and so also can his lessee. *Addison* on Torts, pp. 10, 63 & 64, *Eddingfield* v. *Onslow*. (*e*)

Here *Austin* stands in the place of *Rogers*, and can declare in the same form. *Tucker* v. *Paren*, (*f*) *Laing* v. *Whaley*. (*g*)

(*a*) 4 East, 107.
(*b*) 1 Ell. & B. 665.
(*c*) 6 Exch. 353.
(*d*) 12 Moo. P. C. 131.
(*e*) 3 Lev. 209.
(*f*) 7 C. P. U. C. 269.
(*g*) 3 Hurl. & Nor. 675.

Even admitting that a natural right exists of throwing slabs, &c., into a stream so as to injure a party making a reasonable use of the water, which will scarcely be contended for, the legislature has excluded all considerations of that sort by prohibiting the very act which is here complained of. 1864. Dickson v. Austin.

Counsel also relied on the cases cited in the court below, and Con. Stat. U. C., ch. 48, secs. 3 & 13.

The judgment of the court was delivered by

Judgment.

ESTEN, V. C.—The evidence has not been given to us in this case; but the facts appear to be that one *Rogers* owned the land forming the pond and around it, and through which the raceway was constructed, and on both sides of the river at this place, and the land and mills in question, and demised such land and mills with the right of using a certain quantity of water to the plaintiff and one *Vanalstine* for the term of ten years, and that *Vanalstine* transferred all his interest in the lease to the plaintiff: that at this time a dam and pond and raceway existed which conducted the water of the river to these and other mills; which dam, pond and raceway had existed for more than eight years, and that the owners of mills higher up the river, and amongst them the defendant, had been for many years in the habit of throwing slabs and pieces and grindings of slabs into the river, which gradually accumulated in the pond about the mouth of the raceway and prevented the water from entering the raceway and flowing to the different mills in the same, or in nearly equal quantities, as before. Under these circumstances the present action was brought. It cannot be doubted that the plaintiff is making a reasonable use of the water of the river in turning his mills, and that the defendant, in throwing a quantity of rubbish into the stream so as to obstruct the flow of the water into the raceway is a wrong-doer. It was objected that the plaintiff was not a

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riparian proprietor because his premises did not extend to the bank of the river; but it cannot be doubted that *Rogers* himself, if he occupied these mills, could claim all the rights of a riparian proprietor, and can it make any difference that he has demised the mills to the plaintiff, reserving a narrow strip of land between the mills and the river? The plaintiff stands in the place of *Rogers*, and is entitled to the same remedies during the time that his interest continues.

It was also objected that the declaration was improperly framed, and the right of the plaintiff not correctly stated in it, and that a variance existed between the statement and the proof, inasmuch as the right was claimed in respect of the possession, whereas it appeared from the evidence to have been derived from a grant. But this appears to me to be a mistake; and it appears to me, although I express an opinion on the subject with much diffidence, that the declaration was framed with precise accuracy. The right created by the grant was not the subject of the action. The defendant (*Dickson*) could not be charged with a contravention of the grant because he was not bound by it, or bound to give effect to it. Any riparian owner injured by his act could have complained of it. The plaintiff complains as a general riparian proprietor, and it is of no importance how he became such: whether by this lease, or by conveyance, or by devise. The lease in the present case seems to me to be only incidental as shewing how the plaintiff became a riparian proprietor, and so entitled to complain of the wrongful act of the defendant, which has inflicted injury on him in common probably with other mill-owners equally entitled to complain. It is strictly by virtue of his possession of the premises in question that the plaintiff is entitled to complain of this injury. If he had become a riparian proprietor in any other way he would have been equally entitled to complain of this act of the defendant, if it caused him injury. But even if the right created by the grant were the subject of the action, the case of *Northam* v. *Harley* shews

Judgment.

that the declaration is properly framed. It appears from that case that where the easement is annexed by the terms of the grant to the land as appurtenant, it is sufficient in seeking redress for an infraction of the very right, to claim it by virtue of the possession of the land. In the present case it cannot be doubted that the grant of the use of the water was to the lessees of the mills. The right is annexed as appurtenant to the land, and it is sufficient even in this view to claim the right by virtue of the possession of the land. Then, if this action were brought against *Rogers* or any one claiming under him, for an infraction of the right given by the lease, it would have been sufficient to frame the declaration as it is framed. I think therefore that the judgment discharging the rule was right, and ought to be affirmed with costs. It was argued that the raceway was constructed in such an unskilful manner that it was the cause of the mischief of which the plaintiff complained; but no evidence seems to have been offered in support of this position.

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Judgment.

Per Cur.—Appeal dismissed with costs.

PONTON v. BULLEN.

ON APPEAL FROM THE COURT OF COMMON PLEAS.

Order for arrest by judge—Examination of defendant.

Held, affirming the judgment of the court below, that in proceeding to arrest and imprison a party for the insufficiency of his answers on an examination as to his estate and effects, conducted before any other functionary than the judge who orders the arrest, it is necessary that a summons to shew cause should, in the first instance, be issued. *Also* affirming the same judgment that the fact of the judge who made the order to commit having authority to make such order, and that the same appeared to be regular on the face of it, was not a sufficient justification for the attorney of the party suing out such order in an action brought against the attorney and his clients for assault and false imprisonment.

This was an appeal by *William Hamilton Ponton*, *Hugh Mathewson*, the younger, and *William Smyth*, the younger, from a judgment of the Court of Common

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Pleas, in a cause pending in that court wherein *William Henry Bullen* was plaintiff and the said appellants, together with *Wedderburne Dunbar Moodie* and *Alexander Dunbar Moodie* were defendants.

The facts and pleadings are fully set forth in the report of the case in the thirteenth volume of the reports of the Court of Common Pleas, at page 126.

From the judgment there reported the present appeal was brought on the grounds (1st) that there was error in law in the record and proceedings. (2nd.) That the pleas of *Ponton*, *Smyth* and *Matthewson* disclosed a good defence to the declaration and new assignment in the action.

Statement.

The respondent contested the grounds of appeal, and asserted generally that the judgment was correct and ought to be affirmed.

Mr. *McMichael* for the appellants.

Mr. *R. A. Harrison* for the respondents.

The judgment of the court was delivered by

VANKOUGHNET, C.—I believe we all concur in affirming the judgment of the court below. The main question argued there, as here, was as to the right or power of the judge of the County Court to commit the respondent to prison, because of the insufficiency of his answers to interrogatories administered to him on a personal examination as to his estate and effects, without having first given him an opportunity of being heard, either by summons or otherwise, against the application for such committal. We think that the authorities cited and the reasons given in the judgment of the learned Chief Justice of the Common Pleas amply justified the decision pronounced by the court, and the recent

case of *Cooper* v. *Wandsworth*, (*a*) as well as the *Hammersmith* case, (*b*) (not then before the court) fully sustain it. It was contended by Mr. *McMichael* in appeal, that no judgment could be rendered against the appellant *Ponton* on the record, inasmuch as in the only plea pleaded by him there was no trespass confessed, and that therefore there must be a repleader ordered. For the moment I thought this objection formidable, but on carefully reading the pleadings I think it cannot be sustained. The appellant *Ponton* in his plea avers that he was the attorney for the plaintiff at whose suit the respondent was committed to prison on the judge's order above referred to: that he as attorney for the plaintiff procured the examination of the defendant, the now respondent; that on the *ex parte* order of the judge for the committal of the respondent was endorsed the following notice:

"To the sheriff of the County of Hastings.
J. W. Dunbar Moodie, Esquire.
Sir—You are at liberty to discharge the defendant *Wm. H. Bullen* (the respondent) from custody upon receiving from said defendant (the respondent) the sum of, etc., etc.

(Signed) WM. H. PONTON."

Judgment.

"This order was granted on motion of *Wm. H. Ponton*, of the town of Belleville, in the County of Hastings, attorney for the plaintiff:" that the order so endorsed was delivered to the sheriff to be executed, and that the sheriff by virtue of such order imprisoned the respondent, which are the trespasses, &c. The appellant does not allege that he had ceased to be attorney for the plaintiff at the time the order for the committal of the respondent was obtained and endorsed and delivered to the sheriff, while he avers that he, *Wm. H. Ponton*, was the plaintiff's attorney in the suit. We cannot assume that there was any change of attorney or two of the same name; but on the contrary, we think we

(*a*) 8 L. T. N. S. 278. (*b*) 4 Exch. 87.

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must assume that the *William H. Ponton* who signed the endorsement on the order as plaintiff's attorney was, though not so expressly stated in the plea, the same attorney who had been previously acting for the plaintiff, and who is the appellant, as he himself alleges, and that he was thus instrumental in delivering the order to the sheriff and procuring the arrest of the respondent—acts which make him responsible for the illegal arrest and the trespass thereby committed. We think therefore that the appeal must be dismissed with costs.

ON APPEAL FROM THE COURT OF COMMON PLEAS.

THOMAS COCKBURN KERR, JOHN BROWN, AND WILLIAM FORBES MURRAY, APPELLANTS,

AND

JOHN HALDAN AND THOMAS MORELAND, RESPONDENTS.

Interpleader issue—Assignment for benefit of creditors—Judgment creditors.

A testator by his will gave all his estate, real and personal, to his executors in trust, empowering them at the same time to continue the business which he had carried on in his life-time, which they accordingly did for several years, and in the course of so carrying on the business had acquired a large amount of property, and subsequently assigned the same, as well as that portion remaining on hand left by the testator (about one-ninth) as that acquired since his death, to certain trustees for the benefit of all creditors of the estate, and each executor severally assigned for the benefit of individual creditors; the persons named as trustees took and continued in the possession of the chattels assigned under the several conveyances. The trusts declared were for the benefit *pari passu* of creditors coming in, and who were not bound to release their claims. A judgment having been recovered against the executors individually, upon a note made by them as executors, the judgment creditors claimed a right to seize the goods in the hands of the trustees, notwithstanding the assignments thereof. In an interpleader suit brought to try the question, the court below determined that the assignments were sufficient to pass, and did pass the property to the trustees, who were therefore entitled as plaintiffs in such interpleader suit to a verdict; and that the judgment creditors were entitled, if their judgment and execution were against the executors, to claim as creditors upon the estate assigned by them as such, and if necessary, on the separate estate of each, the joint estate being exhausted. On appeal to this court the judgment of the court below was affirmed, and the appeal dismissed with costs.

This was an appeal from the court of Common Pleas, reported 12th Common Pleas Reports, page 620. From

that judgment the defendants in the interpleader issue appealed, contending (1st) that the personal representatives of the testator, *Benjamin Parsons*, could not delegate their authority by assignment of the goods in question to a third party for the benefit of creditors; (2nd) that the assignments made by the executrix and executors severally would only pass their individual rights in the surplus, after payment of the joint debts, and would not pass, and did not profess to pass the property in the goods themselves; that the assignment made by them as personal representatives was, under the circumstances disclosed in the case, fraudulent and void, as tending to defeat or delay their individual creditors, or as tending to give a preference to the creditors of the estate over their individual creditors; and provides for the payment of the creditors of the estate out of goods which were the property of the assignors individually, and which should be applicable to the payment of their debts.

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Statement.

The plaintiffs in that issue, on the other hand, contended that the executrix and executors could lawfully make such assignment as they did make, for the general benefit of creditors: that such assignment from them and the said several assignments did convey to the plaintiffs all the goods in question in the issue, and that the trusts declared are proper and consistent; that they are valid and free from fraud, and give no preference whatsoever; and that under the circumstances appearing in the case, it appeared that the property in the goods was vested in the respondents, the plaintiffs in the issue.

Mr. *Blake* for the appellants.

Mr. *Hector Cameron* for the respondents.

The facts of the case, and the points relied on by counsel, are stated in the judgment of

McLEAN, Ex-C. J., PRESIDENT.—This is an appeal

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from the Court of Common Pleas in an interpleader issue ordered to be tried by the said court, wherein the respondents were plaintiffs and the appellants were defendants. The appellants having recovered a judgment in the Court of Common Pleas against *Mary Parsons*, *James P. Stonehouse*, and *George H. Parsons*, issued execution on the said judgment against the goods and chattels of the defendants therein, directed to the sheriff of the united counties of Huron and Bruce, who seized certain goods as the goods of *Mary Parsons* and the other defendants mentioned in the execution. The goods being claimed by the respondents an order was made by Mr. Justice *Richards* that the plaintiffs and defendants in that suit should proceed to the trial of an issue at the then next assizes, to be holden at Goderich in and for the united counties of Huron and Bruce, and that the question to be tried should be, whether the goods in the stores or warehouses occupied by the said *Mary Parsons*, *James P. Stonehouse* and *George H. Parsons*, in the market square in Goderich, or any part thereof, were at the time of the delivery of the said writ of execution to the sheriff the property of the plaintiffs as against the defendants.

Judgment.

The issue came on to be tried before myself at the assizes held at Goderich in November, 1862, pursuant to the order of Mr. Justice *Richards*, and at the same assizes a similar issue involving the same question as to the same goods was tried in which the same plaintiffs were plaintiffs and the Bank of Upper Canada defendants. On the trial of the latter suit it was admitted that the defendants' writ of execution was placed in the sheriff's hands on the 11th day of December, 1861. That the judgment on which it was issued was obtained on a promissory note made by *Mary Parsons*, *James P. Stonehouse* and *George H. Parsons* as executrix and executors of *Benjamin Parsons*, and given by them as such whilst carrying on the business in which *Benja-*

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min Parsons and *Mary Parsons* had been engaged before the death of the said *Benjamin Parsons*; but such judgment was recovered against them in their individual capacities (see 11th volume U. C. Common Pleas Reports, 573.) The plaintiffs on the trial of the case against the Bank of Upper Canada, proved and put in an assignment dated the 7th November, 1861, made between *Mary Parsons*, *James P. Stonehouse* and *George H. Parsons*, executrix and executors of the last will and testament of *Benjamin Parsons* the younger, in his life-time of the town of Goderich, merchant, of the first part, and *John Haldan* and *Thomas Moreland* of the second part, and the several persons and firms, creditors of the said *Benjamin Parsons*, who acquiesce in or execute the said assignment of the third part.

2nd.—An assignment dated the 9th of November, 1861, made between *George H. Parsons* of the first part, and the plaintiffs *Haldan* and *Moreland* of the second part.

Judgment.

Similar assignments dated respectively the 11th and 13th November, 1861, from *Mary Parsons* and *James P. Stonehouse* as individuals were put in, and also probate of the will of *Benjamin Parsons* the younger, by which *Mary Parsons* was appointed executrix, and *George H. Parsons* and *James P. Stonehouse* executors of the said will. It was admitted that the assignments were all duly filed within the time required by law, and that there was an actual and continued change of possession to the plaintiffs *Haldan* and *Moreland*. The evidence shewed that *Benjamin Parsons* died in September, 1857. That after his death *Mary Parsons*, *James P. Stonehouse* and *George H. Parsons* continued the business, which in his life-time had been carried on in certain stores or warehouses in the town of Goderich, (being the same referred to in the interpleader order,) that such business was carried on by them in the name of the *estate* of *Benjamin Parsons* up to the date

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Kerr v. Halden.

of the first assignment, 17th November, 1861. That eight-ninths of the goods in question in the issue were purchased on credit by the said *Mary Parsons*, *James P. Stonehouse* and *George H. Parsons* in the course of such business, the remaining one-ninth having been in the store at the death of *Benjamin Parsons*, and remained therein until the seizure by the sheriff. In the assignment of the 7th November by *Mary Parsons*, as executrix, and *Stonehouse* and *George H. Parsons*, as executors, it is recited that *Benjamin Parsons* in his life-time carried on the trade and business of a merchant in the town of Goderich, and incurred debts and liabilities to sundry persons and firms; and further, that he made and published his last will and testament, and thereby appointed *Mary Parsons* executrix, and *George H. Parsons* and *James P. Stonehouse* executors, and gave them power to carry on the said business for the *benefit of his* estate, and gave and devised to them all his real and personal property, except sundry small articles specifically bequeathed, *in trust* in the first place for the payment of all his just and lawful debts, and then upon other trusts in the said will declared. And it is further recited that the said *Mary Parsons James P. Stonehouse* and *George H. Parsons*, as such executrix and executors, continued to carry on the business previously carried on by the said *Benjamin Parsons*, and have incurred debts and liabilities in the name of and on account of the *estate* of the said *Benjamin Parsons* since the death of the said *Benjamin Parsons*; and the affairs and business of the said *estate* of the said *Benjamin Parsons* have become embarrassed, and the assets thereof are not sufficient and available for the immediate payment of the liabilities as they mature, and the said parties *as such executrix and executors* are therefore desirous of making an assignment of all the *estate and effects vested in or belonging to* them as such executrix and executors as aforesaid, and acquired by them in carrying on the said business for the benefit of the creditors of the *said*

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estate without any preference whatsoever, and so that the same should be equally and rateably divided amongst *all* the creditors, and the said parties *Haldan* and *Moreland* have agreed to accept the trusts specified in the said deed. The assignment then conveyed to the said *Haldan* and *Moreland*, their heirs and assigns (several parcels of land specified) to have and to hold, &c., and all the household furniture, goods, chattels and effects belonging to them as executrix and executors of the said *Benjamin Parsons*, and being in and about the dwelling house and premises occupied by the said *Mary Parsons* and *George Henry Parsons*, and also all the stock in trade and store furniture then in or about the houses and premises occupied by the said *Mary Parsons*, *James P. Stonehouse* and *George H. Parsons*, as a dry goods store and a hardware and grocery store, in the market square, in the said town of Goderich, and all book debts, credits, bonds, bills, notes, mortgages and securities, due, owing and belonging to *the estate* of the said *Benjamin Parsons*, together with all books of account, vouchers and other papers relating to the same *upon trust*, first to pay the expenses incident to the preparation and execution of the said deed. Secondly, the costs, charges and expenses incident to the execution of the trusts mentioned in the said deed, and the wages, salaries and hire of such clerks and persons as they might think proper to employ in the realization of the effects and property of the said estate, and as a part of such expenses *to retain* the sum of five per cent. of all moneys received by them as such trustees belonging to the said estate as reasonable compensation for the care, diligence and trouble required and bestowed in and about the proper execution of the trusts contained in the said deed. Thirdly, to pay and divide the residue of the said estate unto and among all and every the creditors of the said *estate* according to the amount of their several claims rateably and share and share alike and without any preference or priority whatever.

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The first assignment in point of date is from Mrs. *Parsons*, *James P. Stonehouse* and *George H. Parsons*, as executrix and executors of *Benjamin Parsons*, conveying to the respondents all the property belonging to them as executors in trust for certain purposes therein mentioned. The objects of the trust are not objected to provided the executors had power to delegate to others the trusts prescribed by the will of *Benjamin Parsons* to be performed by them. It appears that *Benjamin Parsons* died in September, 1857, and from that time till the date of the assignment of the 7th November, 1861, the persons named in the will as executrix and executors carried on the business, which he had conducted, in the name of the estate, and as they seem to have supposed for its benefit or loss. They purchased goods from Messrs. *Kerr, Brown & Co.*, and gave promissory notes for them signed as executors and executrix of *Benjamin Parsons*, but when sued for them, they found that they were liable as individuals and not as executors. The judgment was obtained and execution issued against them as individuals in 1861, but before the execution was placed in the sheriff's hands the executors made the assignment of the 7th November, 1861, in which it is recited that "the affairs and business of the estate of *Benjamin Parsons* have become embarrassed, and the assets thereof are not sufficient and available for the immediate payment of the liabilities as they mature." Whether such embarrassment existed at the time of the testator's death, or whether the subsequent dealing with the property by the executors caused the embarrassment, it is not material to enquire, but from the tenor of the will the strong presumption is, that the latter was the case, as the testator makes several bequests in money, and gives to Mrs. *Mary Parsons*, his late father's widow, the annual income arising from the whole of his real and personal estate, that is to say, the annual rents and profits of his real estate, or of so much thereof as shall remain unsold, the interest of all moneys invested or which

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may be invested by his executors, and all profits arising from the business, and the use of his books, plate, and linen during her life, and at her decease he devises and bequeaths all his estate, real and personal, moneys, rights and interest of every description, to *George Henry Parsons*. The estate being embarrassed and the assets insufficient to meet liabilities as they matured, the executors conveyed to the respondents all the effects of the testator *in trust*, first to pay the costs, and then five per cent. to the trustees for carrying out the trusts, and then to divide the residue amongst all the creditors of the estate, share and share alike, without any preference whatever to any one. The testator gave ample powers to his executors to sell and dispose of his real estate, and to make, seal and execute such conveyances as might be necessary, and to stand seised and possessed of the said real and personal estate and property, bills, notes, bonds, mortgages, moneys, securities and business, or the proceeds thereof in trust, in the first place to pay and satisfy all his joint debts and funeral and testamentary expenses, &c. The executors, when they proved the will and obtained probate, became from that period entitled by law to dispose of any personal property, and in the exercise of that power transferred to the respondents all such property in trust for the payment of debts. The object and terms of the transfer seem to be wholly unobjectionable, and the appellants have no ground on which to object to the assignment of the goods of the estate, not being entitled to look to such goods for payment of a debt not contracted till four years after the death of the testator. As to the goods which the parties, named as executors, supposed they were buying in their character as executors, there are separate assignments from each of the parties to the same persons in trust to pay the debts of each of the assignors, and if the assignment of each of the individuals who owned the goods is not sufficient to invest the respondents with a good title in such goods in the absence of fraud, I am at a loss to imagine how

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a good transfer could be made. The parties to whom the goods were advanced remain still liable to Messrs. *Kerr, Brown, & Co.*, for their value, and it was optional with them to take the benefit of the assignment from the respondents, or to look to the original debtors for the amount of their debt. I think the judgment of the Court of Common Pleas must be affirmed, and the appeal dismissed with costs.

The other members of the court concurring, appeal dismissed with costs.

[*Before the Hon. W. H. Draper, C. B., C. J.; the Hon. P. M. Vankoughnet, C.; the Hon. W. B. Richards, C. J. C. P.; the Hon. V. C. Spragge; the Hon. Mr. Justice Hagarty; the Hon. Mr. Justice Morrison, and the Hon. Mr. Justice Adam Wilson.*]

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

WILLIAM MCINTEE, APPELLANT,

AND

JOHN MCCULLOCH, RESPONDENT.

Slander—Privileged communication—Malice.

In actions for slander or libel it is the province of the judge to determine whether the occasion of uttering the slanderous words, or writing the libellous matter complained of, was or not privileged, and if privileged, *held*, reversing the judgment of the court below, that in the absence of evidence of malice, there is nothing to be left to the jury as to *bona fides*, or otherwise.

This was an appeal from the judgment of the Court of Common Pleas in an action for slander, brought by the respondent against the appellant, refusing a rule to set aside a verdict rendered in favour of the plaintiff, and enter a nonsuit.

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McIntee v. McCulloch.

The words for which the action is brought, and evidence taken at the trial, are fully set forth in the judgments of the court below, reported in the 13th volume of the reports of that court, page 438. From that judgment the defendant appealed, on the ground that the words complained of were privileged by the occasion on which they were spoken, and therefore, that the plaintiff could not recover without proving express malice; that there was no evidence of such malice, and therefore nothing to leave to the jury; that the absence of any evidence or admission of the offence charged by defendant against plaintiff did not take the case out of the general rule stated and approved of in the judgment of the court below, or distinguish it from the authorities by which such rule is established.

The respondent contended that the judgment below was right, and ought to be affirmed on the grounds stated therein.

Mr. *C. Robinson*, Q. C., for appellant.

Mr. *James Patterson* for respondent.

Argument.

In addition to the cases cited in the court below, counsel referred to and commented on *Gardiner* v. *Slade*, (*a*) *Campbell* v. *Spootiswoode*, (*b*) *Cooke* v. *Wildes*, (*c*) *Selwyn's* Nisi Prius, page 1255, *Addison* on Torts, page 708, and the cases there cited.

The judgment of the court was delivered by

VANKOUGHNET, C.—If the judge rule that the occasion justifies the use of the words, what is there to leave to the jury? It is said the *bona fides* of their use, but that is established when the privilege is admitted; for the truth of the words is assumed to support the privilege;

(*a*) 13 Q. B. 796.
(*b*) 3 Fos. & Fin. 421.
(*c*) 5 Ell. & B. 328.

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or at least the defendant is not called upon to prove it, and that being so, the *bona fides* is made out; for the mere fact of the man taking a malicious pleasure in the use of the words on a justifiable occasion gives no cause of action any more than in a case where a judge finds there is reasonable and probable cause for an arrest. Suppose, when the judge, having found that the occasion justified the use of the words complained of, proposes to leave it to the jury to say whether the defendant used the words *bona fide*, believing them to be true, and the defendant, to remove all doubt, offers to prove their truth, when it has been already necessarily ruled that he is not called upon for any such evidence, what will the judge then do? Will he then receive the evidence? Ought not the defendant to be allowed to offer it on the question of malice or *bona fides*, if that is to go to the jury? See *Jackson* v. *Hopperton*, (*a*) *Nolan* v. *Tipping*, (*b*) *Whiteley* v. *Adams*. (*c*)

Judgment.

Per Curiam.—Appeal allowed, and rule to be made absolute to set aside verdict for plaintiff, and enter a nonsuit for defendant in the court below.

(*a*) 10 L. T. N. S. 529. (*b*) 7 U. C. C. P. 524.
(*c*) 9 L. T. N. S. 483; S.C. 10 Jur. N. S. 470.

McDONALD v. McDONELL. 1864.

Mortgagor and mortgagee—Mortgage created by deed absolute in form—Sale by sheriff of equity of redemption—Dormant equities—Statute of limitations—McCabe v. Thompson, (6 Gr. 175) followed—Application of 11th clause of Chancery Act.

In April, 1830, *A.* the owner of real estate being indebted to *B.* in the sum of £121, and unable to pay the same, procured two sureties to join him in a bond for the amount of his indebtedness, and as an indemnity to them conveyed several valuable lots of land by a deed absolute in form taking back a bond of defeasance. Ten days afterwards one of the sureties delivered to *B.* a promissory note of two other persons for about one-half the debt and interest, and in May of the following year, *A.* being still unable to pay, and his sureties desiring to be relieved from liability, it was arranged between *A.* and *B.* that *A.* should convey certain of the lands, which had been so transferred to the sureties to *B.*, which was accordingly done by an absolute deed of conveyance, and the bond cancelled: *B.* at the time giving back a memorandum signed by himself as follows: "Received of Mr. *A. McDonell* lands as follows," (enumerating them, part being cultivated, the rest waste lands) "for the sum of one hundred and twenty-six pounds five shillings;" (this amount being the original debt and interest) "should he want the above property I should have no objection of giving it back if Mr. *A. McDonell* would pay me the above sum in three instalments, viz.," (setting out the several instalments,) "with interest from this date." *A.* was then in possession and occupation of the cultivated lands, and also in possession of the wild lands, and so continued until 1848, when *B.* instituted proceedings in ejectment to obtain possession of the cultivated lands, in which action he obtained possession in 1849. About the same time (1849) other creditors of *A.* had obtained judgment and execution against him under which his interest in these lands was sold in 1850, and purchased by *B.* through an agent. In the books of *B.* (for the year 1849) entries were found charging *A.* with interest on the amouut from 1831 to 1849. *B.* never gave credit for the amount of the promissory note received by him, nor did he produce it or account for it in any way. In 1860 a bill was filed by *A.* claiming a right to redeem, and a decree for redemption was made. On an appeal from the court below,

Held, (*Draper* and *Richards*, C.JJ. and *Morrison*, J., dissenting,) affirming the decree of the court below, first, that, under the circumstances stated, the deed to *B.*, together with the memorandum signed by him, operated as a mortgage security only.

Second, that the circumstances appearing were such as did not warrant the court in its discretion in refusing redemption under the provisions of the eleventh clause of the Chancery Act.

Third, following *McCabe* v. *Thompson*, 6 *Grant*, 175, that the security to *B.* having been created by a deed absolute in form, the right or interest of *A.* therein was not saleable by the sheriff under common law process.

Fourth, that the Dormant Equities Act did not apply, and

Fifth, that under the circumstances the lapse of twenty years since the time appointed for payment did not bar *A.*'s right to redeem.

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In 1831 a mortgage was created by conveyance absolute in form, on several lots of land, one of which was occupied and cultivated by the mortgagor as a farm; the others were wild lands and unoccupied. No attempt was made to disturb such occupation until 1848, when an action of ejectment was brought, and the mortgagee put into possession of the cultivated lands in 1849; but no step was taken to obtain possession of the wild lands other than the fact that the mortgagee had always from the date of the mortgage paid the wild land taxes thereon, and had also, but not until after 1852, sold some of the lands, the purchasers of which had taken possession of them, and continued therein ever since

On a bill filed to redeem in 1860, *Held* (*Draper* and *Richards*, C. JJ. and *Morrison*, J., dissenting) that as to the lands not sold the Statute of Limitations did not apply to bar the mortgagor of the right to redeem. And as to the lands sold, the court ordered the mortgagee to account for the purchase money thereof with interest.

Statement.

The suit in the court below was for redemption, and was originally instituted by *Archibald McDonell* against *Duncan McDonald*, and five other parties, four of whom had become purchasers from him of portions of the mortgage premises, the other being a second mortgagee of a portion of the lands: the bill setting forth that in April, 1830, plaintiff being indebted to defendant *Duncan McDonald* in the sum of £121 5s. 10d., and unable to pay the same, and having been applied to by *Duncan McDonald* to secure the amount, plaintiff procured one *Murchison* and one *Rose* to join him in a bond to *Duncan McDonald*, and which he accepted as security: that in order to indemnify them against loss by reason of such bond plaintiff conveyed to them certain lands in the townships of Mountain and Charlottenburgh, by a deed absolute in form, but intended only as a security; that in April following *Duncan McDonald* received from *Murchison* a promissory note of *Clarkson* and *Swift*, for £67, which he agreed to credit on said bond when paid, which had been paid to, but never credited by, *Duncan McDonald;* that in May, 1831, plaintiff being still unable to pay, and *Murchison* and *Rose* desiring to be relieved from their suretyship, *Duncan McDonald* agreed to give up the bond upon plaintiff giving him directly security on his lands, whereupon and on the 6th of May, 1831, plaintiff executed to *Duncan McDonald* a deed absolute in form of certain of the lands, so as aforesaid conveyed to

Murchison and *Rose*, and which *Duncan McDonald* agreed to accept as a security for £125 5s. *Duncan McDonald* alleging that he had not been paid the promissory note for £67, and he thereupon gave up the bond to be cancelled.

At the time of the delivery of such deed to *Duncan McDonald*, he wrote and delivered to plaintiff a writing in the words following:

"Received of Mr. *Archibald McDonell* lands as follows: No. 5, 6 & 7, in the fifth concession, east half, No. 6 & 7, in the sixth, all in Mountain; and also east half of 28, in the first concession of Charlottenburgh, for the sum of one hundred and twenty-six pounds, five shillings; should he want the above property, I should have no objection of giving it back if Mr. *A. McDonell* would pay me the above sum in three instalments, viz., forty-two pounds one shilling and eight pence on the first day of July next, and interest: forty-two pounds one shilling and eight pence next January, and interest: forty-two pounds one shilling and eight pence on the first day of September, 1832, all bearing interest from this date. Statement.

Signed D. McDONALD.
Cornwall, 6th May, 1831.
Witness. Signed WILLIAM MURCHISON.

That the plaintiff received such writing from *Duncan McDonald*, placing absolute confidence in him, and believing the same to express that the deed was received as a security, and the terms upon which plaintiff might redeem his land, but being unable to read or write, and having no legal advice, plaintiff was entirely in the hands of *Duncan McDonald*, and relied upon his representation of the effect of such writing. *Duncan McDonald*, immediately after the execution of the conveyance to him, caused the same to be registered.

That plaintiff was then in the possession and occupation of the land in Charlottenburgh, and w[illegible]lso in the possession of the other lands, and continued in such

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possession, performing all the acts of ownership on the same until the year 1848, when *Duncan McDonald* brought an ejectment against plaintiff for the lands in Charlottenburgh, and having recovered judgment, entered into possession of the said land in Janury, 1849, and had since continued in receipt of the rents and profits thereof: that about the same time an execution was issued against the lands of plaintiff, at the suit of *Scott, Tyre & Co.*, and the same was placed in the hands of the sheriff of the county where the lands were situated; that *Duncan McDonald* thereupon procured a transfer of such judgment and execution, and caused all the lands of the plaintiff both in Charlottenburgh and Mountain to be advertised by the sheriff, and the same were exposed to sale in the year 1851, and *Duncan McDonald* became the purchaser thereof, through his agent, one *Archibald Macfarlane*, for £285, being the amount remaining due upon the execution, the said lands at the same time being well worth the sum of £1,200. After the sale the sheriff executed a deed to *Macfarlane*, purporting to convey to him the equity of redemption of the plaintiff in the said lands; and *Macfarlane* afterwards executed a deed purporting to convey the same to *Duncan McDonald*, whose agent he had been in the matter of the purchase. The plaintiff submitted that by reason of the mortgage made by him to *Duncan McDonald*, having been absolute in form, the equity of redemption of plaintiff in the lands was not liable to seizure and sale under such execution, and that the deed of the sheriff was null and void, and *Duncan McDonald* took nothing thereunder. Further, that the sale was irregular and void, because the sheriff, instead of offering the lands to competition in separate lots, put the same up in bulk, and for this reason the price realized was far less than might otherwise have been reasonably obtained therefor.

Statement.

The plaintiff, upon this statement of facts, asked the usual decree for redemption.

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The defendant *Duncan Macdonald* answered the bill, insisting that upon the change of the transactions, and on the 6th day of May, 1831, when the deed of that date was executed, and the receipt of the same date was signed by him, the real transaction between him and the plaintiff ceased to be a loan and security, and became a sale with liberty to plaintiff to re-purchase on the terms in the receipt mentioned. That before the Chancery Act was passed, in the year 1837, the time appointed for the liberty to re-purchase had expired, and the legal estate of defendant in the lands had become discharged from such liberty to re-purchase. That the lands, other than the lot in Charlottenburgh, were wild lands, uncleared and unoccupied, and as to them he claimed that he was protected by the Statute of Limitations: he also claimed the benefit of the Dormant Equities Act, as a bar to the relief prayed. That even if the transaction should be considered a mortgage transaction, the same presents a case in which the court should, in the discretion given to it by the Chancery Act, refuse to decree redemption, considering the great lapse of time both before and since the passing of the said act, the little value of the land at the time the transaction took place, the sales to other parties, and all the circumstances of the case.

Statement.

Amongst the evidence read at the hearing were the following copies of entries taken from the books of the defendant *Duncan McDonald:*

1st. An entry from his day-book or blotter, under date July 20th, 1848, as follows:

Arch'd McDonald, Front.

1831.

To Mortgage.....	£126	5	0
Interest, 5th May, 1831.....		12	7
	126	17	7

1864.	June 7.	By D. G. McDonald		7	6	2	
McDonald v. McDonell.	Aug. 4.	Murchison		4	4	9½	
							11 10 11½
							115 6 7½
	Oct. 20.	To one fine comb					1 0
		Payable 1st July, 1st August, 1st September.					
		To Memorial and Registry					15 0
		To drawing and taking affidavits					3 6
		Memorial and registry for Dundas					15 0

2nd. From his ledger marked C. as follows:

Arch'd. McDonald, Front.

1831.							
		To mortgage				£126	5 0
		To interest, 5th May, 1831				12	7
						126	17 7
	June 7.	By Duncan McDonald	7	6	2		
		By W. Murchison	6	4	9½	11	10 11½
						£115	6 7½
	Oct. 20.	To one fine comb					1 0
		Payable 1st July, 1st August, 1st September.					
Statement.		Memorial and Registry in Glengarry.					15 0
		" " in Dundas					15 0
1849.							
		Writing and taking affidavit					3 6
							117 1 1½
	March 15.	To int., 5th May, 1832, £7 0 5; to 33, 7 8 9½; to 34, 7 17 9½: to 35, 8 6 3: to 36, 8 17 3: to 37, 9 7 11: to 38, 9 15 3: to 39, 10 11 11½: to 40, 11 3 9½: to 41, 11 17 3: to 42, 12 4 6: to 43, 13 6 6½: to 44, 14 2 6½: to 45, 14 14 6: to 46, 15 17 6½: to 47, 16 16 6½: to 48, 17 16 9					£198 1 9
		By ledger D., page 24				198	1 9

And 3rd, from his ledger marked D., as follows:

Archibald McDonald, Front.

		To ledger C.	48	£4	10 0
1849.		" Interest	"		
June [illegible]		" Cash for sheriff for dispossessing	"	2	10 0
April [illegible]		" ledger C.	70	4	
		" "	143	198	1 9
1852.					
June 25.		" Cash paid Com'r. 15s.; expenses, 5s., April 28th, '48		1	0 0

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Jan'y. 5	" To costs paid Sandfield, £36 12s. 9d.; costs about.....				1864.
"	" " Deed and Registry.	80s.	5	0	McDonald v. McDonell.

The other evidence in the case bearing upon the points involved appear sufficiently in the judgment of the court.

The cause came on to be heard in the court below, before his honour V. C. *Spragge*, who pronounced a decree in favour of the plaintiff, declaring him entitled to redeem, and directing the accounts consequential thereon to be taken before the master at Cornwall. His honour, after stating the facts to the effect as above set forth, saying, "The first question is, whether this transaction was one of mortgage or was a sale of lands, with right of re-purchase. I think it was a mortgage. The great disproportion between the value of the land and the amount of the debt is one evidence of this, a circumstance alluded to by Lord *Nottingham*, in *Thornborough* v. *Baker*, (*a*) thus: 'If the purchase money had not been near the value of the land, that and such like circumstances might have made it a mortgage.'"

The half lot in Charlottenburgh was the plaintiff's farm, which he then lived upon and cultivated, and was worth at that time at least £500. If this was a purchase, the plaintiff agreed not only to sell his farm at a quarter of its value, but to throw in some 900 acres besides. Again, there is no evidence of a sale, or of any treaty about one; what evidence there is of what passed is that of *Murchison*, one of the sureties, who says that *Duncan* offered to take the land as a security for the debt. Then there was a continued possession by the plaintiff, and that not only for the time agreed upon for re-payment but up to 1848. There are also the entries in *Duncan's* books, charging the plaintiff with interest on the money, to secure which the conveyance was made.

(*a*) 3 Swan. 631.

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The contemporaneous paper has a peculiar phraseology, but does not import a sale any more than a mere security. It was drawn by *Duncan McDonald*, a shrewd man of business, and taken by the plaintiff, an illiterate man, not of business habits. At most it is ambiguous, and it is not open to the man who drew it to place upon it a construction in his favour, when it may bear another construction, and which, too, is favoured by the surrounding circumstances.

I do not think these circumstances are outweighed by the fact of less land being conveyed to *Duncan* than had been conveyed to the sureties; no explanation is given of it. It may have been because a note for £67 held by one of the sureties was given to *Duncan* on account of the debt.

In 1849 the plaintiff was evicted from the Charlottenburg farm, by ejectment, and in August, 1850, that and the other lands conveyed were sold at sheriff's sale, upon an execution by another creditor of the plaintiff, and purchased by *Duncan*, avowedly as the agent of one *Macfarlane*, to whom a deed was made by the sheriff, and who shortly afterwads conveyed to *Duncan*. The defendants *Clarke*, *Black*, *Beggs* and *Hyndeman*, are purchasers from *Duncan* of different parcels of land in the township of Mountain. The defendants set up the 11th section of the Chancery Act of 1837, but I see nothing in the circumstances of the case, or the dealings of the parties between 1831 and 1837 to take the case out of the ordinary law of mortgagor and mortgagee. The Dormant Equities Act is also invoked, but cases of mortgage are not, I apprehend, within the act; and this, in my opinion, was a mere case of mortgage. I do not think the sheriff's sale has altered the position of the parties. An apprehension was confessedly entertained that the plaintiff would at some time assert his right to redeem in this court; he had never abandoned, but always claimed it; and shortly before the recovery of possession in ejectment a sum of money was tendered by

the plaintiff's son to *Duncan* in payment of the debt and interest. The sheriff's sale was brought about in order to extinguish the equity claimed by the plaintiff; and the purchase, though in the name of *Macfarlane*, was only a mode of vesting the estate absolutely, and free from this claim, in *Duncan McDonald*. I think the evidence shews all this; but even if it were not so, the lands came again into the hands of *Duncan*, and if redeemable before the sheriff's sale, would be so afterwards. The only difference that the sale could make would be, I think, in the terms upon which redemption ought to be decreed. 1864. McDonald v. McDonell.

It is urged that the right to redeem is barred as to the lands in Mountain by the Statute of Limitations. These lands were in a wild state until after their sale by *Duncan McDonald* to the other defendants; there was, so far as appears, no actual possession, and possession therefore will be deemed to be in the person having title. A mortgagee has a right to obtain possession, but until obtained I should think it would be presumed to remain in the mortgagor, as in fact it ordinarily does; and as it is generally the desire and the interest of the mortgagee that it should. I think, therefore, that I cannot take the plaintiff to have been out of possession of these lands so as to be barred by the statute. Judgment.

In regard to *Clarke*, *Black*, *Beggs* and *Hyndeman*, I think the evidence is not such as to affect them, or any of them, with notice, but *Duncan McDonald* having sold to them without notice of the plaintiff's equity to redeem, would be bound to account to him for the value of the lands, or as is prayed in this case, for the purchase money received by him from the purchasers.

I cannot but feel that the plaintiff's claim to redeem these lands is of very old date; and I have a great reluctance to give effect to stale demands, but there has been in this case no abandonment, no acquiescence, no

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dealing to affect the plaintiff's equity, only lapse of time, and that not of sufficient length to bar the right; and it was always, after 1837, in the power of *Duncan McDonald* to foreclose if disposed to admit the equity.

The decree must be to redeem, but, under the circumstances, *Duncan McDonald* should be allowed to apply the rents and profits, or occupation rents of the Charlottenburgh farm, in the first place, to pay off all arrears of interest, not confining him to six years; and as was directed in *Bullen v. Renwick*, (*a*) upon re-hearing, he should be allowed for all improvements, and should be charged only for occupation rent or such rents and profits as he received, not for what he might have received; and I do not think it a case in which the account should be taken against him with rests, and he should also be allowed the amount for which the lands were sold at sheriff's sale, with interest. As to costs, he should pay all the costs but those of an ordinary redemption suit, and those costs should not be excepted if the amount tendered in 1848 was the whole amount then due. The plaintiff must pay *Clarke*, *Black*, *Beggs* and *Hyndeman* their costs, and have them over against *Duncan McDonald*; the costs of *Allan McDonald* to be as is usual in the case of a subsequent incumbrancer.

From the decree then pronounced the defendant appealed, and on the appeal coming on for argument,

Mr. *Blake* (Mr. *Wells* with him) for the appellant.

Before the passing of the Chancery Act, a creditor, when arranging with his debtor, would have been much more likely to take a deed with a right of re-purchase than a mortgage; the absence of any equitable jurisdiction in which a mortgagee could enforce his rights, causing such difficulties in the way of his realizing any security he might hold, as to render it peculiarly desirable that he should place himself in as secure a position

(*a*) 9 Gr. 202.

as possible. At all events no one can doubt that if a creditor did accept a mortgage, he would, at the same time, insist on the debtor giving a covenant securing the payment of the amount intended to be secured; here no covenant was given. At the same time mortgagors were in no better position; they could not redeem; their only course was, in the event of ejectment being brought, to stay proceedings by payment of the amount appearing due; if the mortgagee obtained possession of the property there was no remedy for the mortgagor. The sale, with a right of re-purchase, was perfectly fair, the only injury to the debtor was that it bound him to punctuality in his payments. The words of the Chancery Act, section 11, recognise these disadvantages to the fullest extent, and the principle now contended for was acted upon by this court in *Simpson* v. *Smyth*. (*a*) He also contended that the disproportion in the value of the lands and the amount due was not such as to raise a presumption in favour of the claim set up by the respondent; true, the lands were much more valuable than the price agreed to be paid; but that may easily be accounted for by the fact that the vendor had the right of re-purchase.

He relied, also, upon the great lapse of time (nearly thirty years) from the giving of the deed until the filing of the bill as evidencing a knowledge on the part of the vendor that he had no right to the property after the expiration of the time allowed for re-purchasing the premises.

If, however, the court should be of opinion that this transaction was one of mortgage, and not a sale, and that the eleventh section of the Chancery Act is applicable, then the sheriff's sale is a strong reason why, in its discretion, the court should refuse relief; referring to *Stanton* v. *McKinlay*. (*b*) He relied, also, on the Dormant Equities Act, and the Statute of Limitations, as furnishing a complete bar to the claim set up in this bill.

(*a*) Ante vol. i, p. 1.

(*b*) Ante vol. i, p. 265.

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Mr. *Mowat*, Q. C., (Mr. *McLennan* with him,) for the respondents.

A reference to any registry office in the country will shew that before the passing of the Chancery Act mortgages were of just as frequent occurrence as they have been since. Sales with the right of re-purchase were almost unknown in practice, at all events, they were quite as little resorted to then by creditors as they have been since the act. The statute, 7 Geo. II., under which alone it is said the mortgagor could obtain relief, applies only to cases where there is no dispute as to the fact of mortgage, and the defendant's right to redeem, or as to the amount mentioned in the mortgage deed being the whole debt secured.

The entries taken from the books of the appellant, he contended, were of themselves sufficient to establish the right to redeem, even in the absence of any written memorandum or agreement; but with the writing set forth in the bill, they are conclusive proofs that the original transaction between the parties was one of mortgage, and not a sale with the right of re-purchase. In those entries it is called "mortgage," and interest is charged up to 1848-9, and certain small credits are given on account.

At to the evidence of value, it was shewn to be at least four times that of the sum secured, even if the note given by *Murchison* to *McDonald* were excluded. Besides that, a sale with a right of re-purchase has always been regarded with suspicion. *Bulwer* v. *Astley*. (*a*) It is not shown here that there was any treaty whatever for a sale, neither was there any discussion as to price.

Another ground, sufficient of itself to warrant the court in granting the relief, was the fact that no profes-

(*a*) 1 Phill. 422.

sional adviser intervened between the parties; the papers were prepared by the mortgagee himself, who is shewn to be an intelligent man of business, whilst, on the other hand, the mortgagor was illiterate, unable to either read or write.

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The title under the sale by the sheriff was not set up by the answer, but if it had, the fact that there was not any proviso for redemption contained in the deed rendered the interest of the debtor unsaleable, as was determined by the Court of Chancery in *McCabe* v. *Thompson*; and this sale is of itself strong proof as to what was the interest conveyed, for it is in evidence that the sale was brought about by the appellant himself, for the avowed purpose of strengthening his own title, and barring any rights still remaining in the respondent, this, of itself, ought to be sufficient to establish the fact alleged by the bill that the original transaction was one of mortgage; had it been as alleged by the answer a sale with right of re-purchase there would not in fact have been any interest to sell, the time limited by the memorandum signed by the appellant having expired long before the time of the sale.

Mr. *Blake*, in reply.

Scott v. *Scholey*, (*a*) Doe *McLean* v. *Fish*, (*b*) Doe *Roffey* v. *Harrow*, (*c*) *Brown* v. *Notley*, (*d*) *Parry* v. *Deere*, (*e*) *Pringle* v. *Allan*, (*f*) *Howell* v. *Price*, (*g*) *King* v. *King*, (*h*) were also referred to by counsel.

McLean, Ex-C. J., President, thought that for the reasons stated in the judgment in the court below the decree ought to be affirmed, and this appeal dismissed with costs.

Draper, C. J.—I have not been able to bring myself

(*a*) 8 East, 671.
(*b*) 5 U. C. Q. B. 95.
(*c*) 3 Ad. & Ell. 67.
(*d*) 3 Exch. 219.
(*e*) 5 A. &. 551.
(*f*) 18 U. C. Q. B. 575.
(*g*) 1 P. W. 294.
(*h*) 3 P. W. 358.

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to the conclusion that in the intention and contemplation of either the plaintiff or defendant the transaction of the 6th of May, 1831, was a mortgage. The marked difference between the transaction of the preceding year and the one now in question influences my mind strongly on this point, and as to the evidence I cannot rest with any degree of confidence on the recollection of witnesses as to transactions which happened thirty years before they gave their evidence, and whose interest in the transaction ceased at that time: I allude to *Rose* and *Murchison*, the only two persons except the plaintiff himself who give any account of what preceded and accompanied the execution of the deed and agreement of May, 1831. I must rely mainly on what is written of the facts.

Judgment.

In April, 1830, the plaintiff made an absolute conveyance to *Rose* and *Murchison*, to indemnify them for having become his sureties to the defendant, and he took back a bond expressly conditioned for a reconveyance, when they should be freed from liability, or re-paid if they had to advance money for him. But in this transaction he conveys absolutely, and takes back a writing by which defendant says, "should he" (the plaintiff) "want the above property, I have no objection of giving it back if Mr. *A. McDonell*" (the plaintiff) "would pay me the above sum" (£126 5s. 0d.) "in three instalments." The phraseology is, as has been well remarked, peculiar, but contrasted with the language of the bond taken from *Rose* and *Murchison* that they "will re-convey" to plaintiff "his heirs and assigns for ever" the two thousand acres of land specified, it leads strongly to the inference that in the latter transaction a re-sale was contemplated.

In *Thornborough* v. *Baker*, the case of *St. John* v. *Wareham* is cited, in which the defendant, for £3,000, conveyed the land to Sir *R. Grobham* and his heirs. He made a lease to *Wareham*, rendering to him and his

heirs £230 per annum, and the lease was for seven years, with *nomine pœnæ* distress and clause of re-entry, and a proviso that if *Wareham* and his heirs should, within seven years, be desirous to re-purchase, and signify the same to Sir *R. Grobham*, his heirs and assigns, and pay them £3,000, then he and they to assure to *Wareham*. The court decreed the money to the heir of Sir *R. Grobham*, and not to the plaintiff, his executor, "and justly, for this was not the case of a mortgage, but of an absolute purchase, for the proviso could not turn it to a mortgage, but was a mere collateral agreement for which there was no remedy in equity." But Lord *Nottingham* adds, "if the purchase money had not been near the value of the land, that and such like circumstances might have made it a mortgage." There is a great resemblance between the facts of the present case, and those of *St. John* v. *Wareham*, and the application of it as governing this case must depend on the existence of those facts which might make an agreement (the language of which imports a re-purchase) a mortgage only. In considering these, it must be borne in mind that to secure the sureties in 1830, the plaintiff conveyed three hundred acres in Charlottenburg, four hundred acres in Kenyon, and thirteen hundred acres in Mountain, while to the defendant he conveyed one hundred acres in Charlottenburg, and nine hundred in Mountain, and according to the first arrangement defendant was to be paid £121 5s. 10d., with interest, by three instalments, the last of which fell due on the 1st of April, 1831, while, by the second, the defendant agreed to receive £126 5s. 0d., with interest, by three instalments, the last of which fell due on 1st September, 1832, thus extending the credit for seventeen months.

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Judgment.

There are but two circumstances which appear to me of importance enough to require examination, for if they are not of sufficient weight to make this a mortgage rather than an agreement for re-purchase, I see no other. The first is the value of the land as compared with the sum that was due to defendant; the second, the entries made in the defendant's own books.

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As to the first, there are some considerations, though not forming part of the evidence, which I cannot overlook or reject. There was but little money in circulation in 1831, we had but one bank of issue in Upper Canada; land, speaking generally, was not saleable except on credit, and that extending over years, and people in mercantile business would not willingly tie up their capital in land, and therefore if compelled to do so drove as good a bargain as they could. The great influx of emigration was only then beginning, and for a long time it did not consist of a class who were purchasers of land. Now not a single witness speaks of the value of this land in 1831. There is but one, *John Rose*, who goes back as far as 1839, at which date he values the hundred acres in Charlottenburg at £500, and this value he arrives at from the fact that a similar quantity of land near this sold in 1839 for £400, and he thinks this worth £100 more; what the terms of that sale were as to credit we do not know: but his co-surety *Murchison* says "the plaintiff's lot in Charlottenburg" (the 100 acres in question I suppose) "is *now* worth from £500 to £600; I would give that for it." That is in the latter part of 1860 or in 1861; other witnesses rate the present value far higher, it is true, but no one but *Rose* goes farther back than 1849: I cannot treat this as sufficient testimony of disproportion between the value of this land in 1831 and the price paid by defendant, under the circumstances, to make this a mortgage. As to the lands in Mountain they do not appear to have been estimated at a higher value than the wild land tax accruing on them. The evidence of the treasurer of the district renders further remarks unnecessary upon them.*

Judgment.

The entries in the defendant's own books present a more doubtful question: not one of them appears to have been made before July, 1848. It seems to have

* This witness stated that at the sales in 1830 and 1831 frequently the whole lot was sold for the taxes—£3 5s. 0d. on each 200 acres—seldom only half the lot, and that a large portion never was redeemed.

been in that year that the defendant brought ejectment to obtain possession of this land, and heard for the first time a suggestion that there was an outstanding equity of redemption which would defeat his legal estate in the premises, and it was after the trial of that ejectment that the plaintiff first took a step which indicated that he was asserting the rights of a mortgagor. The defendant had previously, as one witness expressly states, "insisted that he had a perfect title." When he became impressed with the idea that the transaction of 1831 was—though never so intended or understood by him—a mortgage, and that the plaintiff had a valid right of redemption, it was a natural step for him to make out a statement of his claims as a holder of a mortgage, but it would, I think, be highly inequitable to hold that his thus acting under such an impression could be treated as a voluntary recognition of the right to redeem: it would be monstrous to say it could change the original character of the transaction if it were not at first a mortgage. Even then, so far from yielding to the plaintiff's alleged right, he consulted with his solicitor as to how it might be extinguished, and under an erroneous idea conveyed to him of the operation of the then recent statute 12 Victoria, chapter 73, § 1, he purchased the right which *Macfarlane* had acquired under a sheriff's sale on an execution against the real estate of the plaintiff, being, I think, beyond all possible question under the belief that he thereby united this equity of redemption to the legal estate which he already had.

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So far as these two grounds are concerned they are, in my judgment, insufficient to deprive this writing of the character of an agreement on the defendant's part to re-sell to the plaintiff, and opposed to them is the absence of any covenant on the plaintiff's part to pay, or any remedy for the defendant to get back his money if he desired, while he had none of the advantages which a mortgage usually gives, except the power of entry, and the then useless power to foreclose.

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But the bill charges that defendant "is an uncommonly shrewd man of business." I should not have deemed this allegation worthy of notice, if I had not found it alluded to in the judgment in connexion with the statement that the agreement of May, 1831, was written by him. The only evidence on the subject is that given by the Hon. J. Sandfield Macdonald, who, speaking of the defendant, says, "he is a shrewd man and has had much experience." This expression is treated as reflecting back upon a transaction about thirty years old, and as casting a cloud upon the defendant's share in it, as the plaintiff was and is confessedly an illiterate man. Except these few words there is nothing in the evidence bearing on the defendant's shrewdness. But how is it displayed in this transaction? Is it in designing to draw an instrument by which he simply agreed to re-sell land just conveyed to him, on being paid the price named within a fixed time, and instead thereof writing that which the Court of Chancery have held to be a mortgage? It is not I presume questioned that the defendant intended only to bind himself to a re-sale, and not to convert the deed he had into a mortgage. Now if the parties had changed places, and it was the defendant who sought to redeem, founding his claim on the latent meaning of the writing, there would have been ground for thinking it the act of an "uncommonly shrewd man," which if such had been the case, might have been rendered justly into the words, "a designing knave," but all that the defendant's shrewdness has effected, as the case stands, is to enable the plaintiff to set up a claim which I firmly believe never entered the mind of either plaintiff or defendant when the deed and writing passed between them, and which but for the judgment appealed against, I should on this evidence have unhesitatingly said had no existence.

Judgment.

Then an argument in support of the contention that a mortgage was created, is built upon the fact that the plaintiff was left in unmolested occupation of the

land from May, 1831, until the ejectment was brought in 1848, during all which time defendant did nothing, neither demanding principal nor interest, nor rent nor possession. What was the plaintiff about all this time? He neither paid nor offered to pay any thing; but if he could have held on three years or so longer on the same footing, the Statute of Limitations which was running in his favour would have barred the defendant's recovery. It may be said that as mortgagor he might well remain in possession, but not as vendor. True as regards a mortgage drawn in the usual form, entitling the mortgagor to hold until default, but there is nothing in this writing to entitle him to an hour's possession in one character more than the other, and in either the Statute of Limitations would begin to run in his favour on the same day: whether as purchaser or mortgagee the defendant had the right to immediate possession under the deed, and the writing did not qualify or limit that right.

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It is no part of the plaintiff's case that the writing does not contain what the parties intended. The contention is that as it stands it constitutes a mortgage. In my opinion, reading it alone, it is plainly an agreement for sale, and I do not think that there are circumstances shewn sufficient to convert it into a mortgage.

But even if I arrived at the conclusion that this was a mortgage I should not look upon this as a proper case for decreeing redemption. I look upon the lapse of time as a strong reason in the defendant's favour. The estate became absolute in law on the 1st September, 1832, the defendant got possession in 1848 or 1849. The plaintiff's equity of redemption was sold, or rather was supposed to have been sold, under a *fi. fa.* against lands in 1850, and this suit to redeem is not begun until April, 1860; moreover, but for the peculiar manner in which the equity of redemption is created, I presume the sheriff's sale would have passed it:—I mean if it had been created by an ordinary mortgage, and then if the

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defendant had acquired it, and as a consequence of his being the mortgagee, if instead of the equity of redemption being merged by its vesting in the owner of the legal estate, it revived in favour of the plaintiff, I should not the less think this under all the circumstances a case falling within the 11th section of the Chancery Act, and as one in which a redemption should not be decreed.

But even if the decree as to redemption can be otherwise supported I cannot concur in what is said as to the land in Mountain.

Whether the deed of 6th May, 1831, be an absolute conveyance or a conveyance by way of mortgage it passed the legal estate in the 900 acres in Mountain. These lands were then, and for many years afterwards, unoccupied and in a state of nature. I have hitherto supposed that the legal title draws to it in contemplation of law the possession—if in fact the lands be unoccupied—and that it was on this ground that the party having the legal title could maintain trespass, though in actual fact he did not occupy them, and they were wholly uncultivated and unimproved.

Judgment.

I concede that if the plaintiff, as mortgagor, had continued in actual possession of these lands, no inference could have arisen from the defendant's having the legal estate that he was in possession also. On the contrary, if by the terms of the mortgage the mortgagor had a right to remain and did remain in possession, the mortgagee could not lawfully enter on him, and if without any such right the mortgagor continued in actual possession, doing nothing which amounted in law to a recognition of the mortgagee's title, the lapse of twenty years would bar the mortgagee's right of entry. But I cannot agree that where the mortgaged lands are wholly vacant both before and after the mortgage, the mortgagee loses his right of entry because for twenty years

after he acquired the legal estate he did not enter into actual possession or exercise any acts of ownership on the land. So long as he has the legal estate and no other person enters or exercises acts of ownership on the land, the possession in the eye of the law is with the title, and though such title was originally acquired by an unequivocal mortgage which became absolute at law by the mortgagor's default; though the lapse of twenty years from the date of such default would extinguish the right to redeem, (no change having taken place and nothing having been done in the interval by any one,) it could not affect the mortgagee's right as absolute owner.

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On the whole I think this bill should have been dismissed with costs, and I therefore think the decree should be reversed.

VANKOUGHNET, C.—Thought the decree of the court below right. If what is shewn to have taken place in this case had all occurred since 1837, no doubt could have been entertained by any one as to the right of the mortgagor to succeed. Had the mortgagee here taken possession of the property, and used it as his own, it would have been different: but he allowed every thing to remain as before until 1848-9, at which time a court of equity had been in existence twelve or thirteen years, during all which time it was open to him to have foreclosed the rights of the mortgagor had he chosen to admit his right to redeem. Under all the circumstances his lordship thought the decree ought to be affirmed, and the appeal dismissed with costs.

Judgment.

RICHARDS, C. J., agreed in the views expressed by his Lordship the Chief Justice of the Queen's Bench, that the appeal should be allowed, and the bill in the court below dismissed with costs.

ESTEN, V. C.—I am satisfied that this was a mort-

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gage, and that the decree of the court below was right and ought to be affirmed, so far as it declared it to be so. Supposing it to be a mortgage the Statute of Limitations has no application, for the appellant did not take possession of the lot in Charlottenburg until 1849, and of the lands in Mountain he did not take possession at all. No case whatever is shewn under the Chancery Act, in fact nothing has occurred in this case but what might probably have occurred had a Court of Chancery always existed, and what might reasonably occur in England. The mortgagee has sold some of the Mountain lands; this should have no effect as to redemption of the remainder, and should not prevent him from being accountable for the proceeds of the lands sold, sold, too, long after the establishment of the court. Of the lot in Charlottenburg the mortgagee took possession in 1849, by means of an action of ejectment. This circumstance occurs every day every where, and the mortgagee is of course accountable for the rents, and the proceedings could not have been stayed in the action by a tender of the money, as we must intend that the equity of redemption was disputed. The statute of 18 Victoria, chapter 124, commonly called the Dormant Equities Act, seems to me to have no application to this case. It is true that the legal title of the defendant was complete, and the equitable title of the plaintiff existed before the passing of the 7 William 4th, chapter 2, the original Chancery Act, but this equitable title was recognised by the defendant to a late period by the personal occupation of the lands in Charlottenburg without the payment of any rent until 1848; which extends in its effect to all the lands, by the accounts in the defendant's books, and by the sale and purchase of the equity of redemption in 1850. Then it has been decided that the act does not apply to mortgages framed with a proviso for redemption; and it appears to me that for the same reason it ought not to apply to mortgages made by means of absolute conveyances, or by means of absolute conveyances accompanied by a bond or memorandum of agreement for redemption. Cases

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of the two latter classes may call for discussion and debate and give rise to difficult questions, but the 18th Victoria, chapter 124, was not passed in order to exclude such discussions, but in order to quiet titles. The discussion will terminate in establishing either that the transaction was not a mortgage, in which case the suit must fail, or in establishing that it was a mortgage; and this fact once established it is unnecessary to apply the provisions of the 18 Victoria to the case, because the 11th clause of the 7 William 4th, chapter 2, is amply sufficient to secure the ends of justice. I think, therefore, that for all these reasons the decree ought to be affirmed with costs.

MORRISON, J., concurred with his lordship the Chief Justice of the Queen's Bench.

A. WILSON, J., thought the decree of the court below right, and that the appeal should be dismissed with costs.

Judgment.

Per Curiam.—Appeal dismissed with costs. [*Draper* and *Richards*, C. JJ., and *Morrison*, J. dissenting.]

ON APPEAL FROM THE COURT OF COMMON PLEAS.

McGUFFIN v. RYALL.

Pleading—Judgment non obstante veredicto.

In an action by a principal against his agent, for neglect in insuring his property (a stock of goods) in such a manner that, a loss occurring, the insurance company, on being sued for the amount of insurance, obtained a verdict on the ground that the goods had been insured at an over-value, the declaration alleged the value to be $3,000, to which the defendant, amongst other pleas, pleaded that plaintiff had not, at the time of making application to insure, nor at any time thereafter, goods in his store to the value of $3,000, and the jury found for the defendant on these pleas. *Held*, reversing the judgment of the court below, that the traverse of value in the declaration was an immaterial traverse, and that plaintiff was entitled to judgment *non obstante veredicto*.

This was an appeal from the judgment of the court of Common Pleas, as reported in the reports of that

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court, volume xiii., page 115, where the pleadings are fully set out. From that judgment the plaintiff appealed on the following, amongst other grounds:

That there is error in law, in this, that the issues raised by the first and fifth pleas are immaterial, and although found for the defendant by the jury, judgment thereon, notwithstanding such finding, ought to have been given for the plaintiff.

Mr. *McMichael*, for the appellant, referred to *Stephen* on Pleading, 89; *Couling* v. *Coxe*, (*a*) *Down* v. *Hatcher*. (*b*)

Mr. *J. H. Cameron*, Q. C., for respondent. Every defence which was open to the company in the action brought against them is open to the agent, no matter how negligent the agent may have been in the mode of transacting the business of the principal.

Statement.

Judgment *non obstante* cannot be given here; it can be given only when the cause of action is confessed, and the issue found for the defendant is immaterial. Here it is shewn the plaintiff authorised the defendant to effect an insurance on his goods, valued at $3,000, which was more than the goods were worth, and for that reason the plaintiff had failed in his action brought against the company.

He referred to *Phillips* on Insurance, chapter 29, section 2172; *Hughes* on Insurance, page 98; *Cooper* v. *Blick*. (*c*)

VANKOUGHNET, C.*—It seems to me that the first and fifth pleas raise immaterial issues. The declaration charges negligence generally in insuring the goods, not any specific act of negligence. It does not allege that plaintiff instructed defendant to insure as at a value of $3,000, nor that the defendant did so insure, nor

(*a*) 6 C. B. 703. (*b*) 10 Ad. & Ell. 121.
(*c*) 2 Q. B. 915.
*DRAPER, C. J., gave no judgment.

that he made any representation of value to the insurance company. How, then, can the plaintiff's statement of value be material? and if it could, plaintiff avers that defendant had knowledge of this value. 1864. McGuffin v. Ryall.

RICHARDS, C. J., remained of the same opinion as expressed by him in the court below.

ESTEN, V. C.—It would seem that the tenth plea is an answer to the whole declaration, because, being found for the defendant, it shews that the statement that the stock was of the value of $3,000, which caused the failure of the action, was made with the authority and sanction of the plaintiff. But it would seem that the third count, and the pleas to it, are withdrawn from consideration; and on the first and second counts, and the pleas to them, the state of facts appears to be that the defendant was employed by the plaintiff to effect the insurance in question; that the policy became void through the carelessness, negligence, and improper conduct of the defendant, and that the plaintiff had not a stock of the value of $3,000 at the time of effecting the insurance: it no where appears what the instructions of the plaintiff to the defendant were, and it being consistent with all that appears that he might have instructed the defendant to insure in the proper amount, and that the defendant improperly insured in the amount of $3,000, the value seems to me immaterial, and I think the plaintiff is entitled to enter judgment *non obstante*, supposing the third count, and the pleas to it, wholly excluded from view. Judgment.

HAGARTY, J.—It seems to me that on the face of the declaration the allegation of the value of plaintiff's stock is not traversable as a material averment.

The defendant could readily make it material by averring that plaintiff represented the value to be as alleged, $3,000; that such allegation was untrue, and that thereby the insurance effected on its faith became void.

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It is one thing to hold all statements of value in insurance negociations to be material, and another to hold them material and traversable in an action framed as in this case. The gist of the charge is negligently effecting an insurance. I do not think plaintiff could be required to prove the value to be as laid in his declaration. He could recover, I think, on this count on proof of a value of stock of $500 if the rest of the count could be proved, viz., that such value was lost by defendant's neglect in effecting the insurance.

ADAM WILSON, J.—The question is, whether this is a good issue? I think it is; the plaintiff has bound himself to the allegation that he had in his store stock in trade and effects *to the value of* $3,000; the whole frame of his declaration has made what might have been an immaterial matter a very material fact. See *Colbourne* v. *Stockdale*, (*a*) *Chitty* on Pleading, volume i., page 326, (6th ed.)

Judgment.

If the plaintiff had complained of the defendant for not insuring for a sufficient sum in proportion to the $3,000, or for insuring for too much in proportion to it, the sum of $3,000 would have been a material and precise statement.

But although it might have been made material in this view, it does not appear that any thing has been founded upon it which has made it material; the plaintiff does not complain of any neglect whatever in connexion with the amount; he does not shew that the value of the goods has any thing whatever to do with the wrongful act charged.

Because of its perfect immateriality, I think that the plaintiff was and is entitled to judgment *non obstante veredicto.*

Per Curiam.—Appeal allowed, and the rule to enter judgment for the plaintiff *non obstante veredicto* to be made absolute.

(*a*) Strange, 493.

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ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

CHARLES BLACK, JOHN BLACK, WILLIAM VADER, AND ISABELLA HIS WIFE, ROBERT F. PEGAN AND MARY HIS WIFE, ELLEN REGAN AN INFANT, BY JOHN HECTOR, HER GUARDIAN, AMOS VANLEEK AND MARGARET ANN HIS WIFE, JOHN FOWLER AND WILLIAM FOWLER, JOHN BLACK FOWLER AND ELLEN FOWLER, INFANTS, BY JOHN HECTOR THEIR GUARDIAN,

APPELLANTS,

AND

WILLIAM BLACK,

RESPONDENT.

Agreement to devise—Specific performance—Part performance—Practice —Appeal by several defendants when one not entitled.

The owner of real estate who was old and enfeebled had, for the purpose of inducing his son to relinquish his own farm and come and reside with, and take care of the father during his life, promised the son to give him the farm upon which he (the father) was residing, and the son subsequently removed with his family to reside with the father. After remaining in the house for a few days, the son's wife and family, during his temporary absence, removed from the house of the father in consequence of disagreements with him, and before the son returned the father died. It was alleged that the father had made a will devising the property, but after his death no trace of any will could be discovered, nor was there any satisfactory account given of it. A witness to the alleged will gave evidence of its execution by the testator, but it was not shewn that there had been a second witness to it, nor were its provisions shewn; under these circumstances, *held*, reversing the decree of the court below, that there was not such an act of part performance as would take the case out of the Statute of Frauds.

Where defendants appealed jointly, and the court thought that all of them except one were entitled to be relieved from the decree which had been pronounced in the court below, the court reversed the decree, notwithstanding that as to one of the appellants the evidence was sufficient to establish the will under which the plaintiff claimed to be entitled to the estate in question.

This was an appeal from the decree of the Court of Chancery in a cause wherein the respondent was plaintiff and the appellants were defendants.

The facts giving rise to the case appear sufficiently in the report thereof in the ixth. volume of the reports of that court, page 403.

From the decree there pronounced the defendants appealed.

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Mr. *Hector*, Q. C., for the appellants, ot her than *Charles* and *John Black*, and Mr. *C. S. Patterson*, for *C. & J. Black*, contended that the decree ought to be reversed on the following, amongst other grounds:

That there was no sufficient or binding agreement within the Statute of Frauds between the plaintiff and his late father: that there was no part performance of the alleged agreement sufficient to take the same out of the Statute of Frauds: that the alleged agreement was without consideration and voluntary, and was in fact cancelled by the late *John Black* in his life-time; that such agreement was not such as a court of equity would enforce, and that there was no proof of the due execution of the will by the late *John Black*.

Argument.

Mr. *Strong*, Q. C., for the respondents, contended that the decree appealed from was right and ought to be affirmed on the following amongst other grounds: that the agreement proved between the respondent and his father was founded on a good and valuable consideration, and that sufficient acts of part performance were shewn to take the case out of the Statute of Frauds; that the agreement was such that it ought to be specifically performed by a court of equity, and the respondent therefore was entitled to the relief given him by the decree: also that there was sufficient proof of the due execution of the will of the father in the pleadings mentioned.

Loffus v. Maw, (*a*) and *Fry*, on Specific Performance, sec. 140, were cited to show that the court will specifically perform an agreement such as is shewn in this case. Had the agreement been reduced to writing no doubt can exist that the court would have compelled a specific performance of it; the facts which are shewn constitute a good consideration for such an agreement, and the acts of part performance are amply sufficient to remove all objections under the statute. No one on read-

(*a*) 3 Giff. 592.

ing the evidence in this case, can doubt that a will was actually made by the father, and in that case *Loffus v. Maw* shews that the testator, after having by his promises and representations induced the respondent to change his position, was not at liberty to alter or vary such will; in other words, the will, under the circumstances, was irrevocable. He referred also to *Lester v. Foxcraft*, (a) and the cases there cited: Notes of Cases, volume iii., pp. 22, 207, and volume vi., p. 699, and to *Williams v. Williams* (b) as clearly shewing the jurisdiction of the court in a case like this.

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In addition to the cases cited in the court below, counsel referred to and commented on *Montague v. Maxwell*, (c) *Money v. Jordan*, (d) *Mundy v. Jolliffe*, (e) *Kirk v. The Bromley Union*, (f) *Redding* v. *Wilkes*, (g) *O'Rielly v. Thompson*, (h) *Whaley v. Bagnel*, (i) *Welch v. Phillips*, (j) *Cutto v. Gilbert*, (k) *Jennings v. Robertson*, (l) *Johnson v. The Canada Company*, (m) *Clark v. Wright*, (n) *Frame v. Dawson*, (o) *Webster v. Webster*, (p) *Price v. Salusbury*, (q) *Stump v. Gaby*. (r)

DRAPER, C. J., stated that so far as the claim of the respondent to the relief asked rested upon the fact of part performance, he thought the evidence failed to establish the case stated in the bill; and this ground alone was sufficient to preclude him from obtaining the relief asked. It was true that the facts that were proved rendered the case one of such a peculiar nature that it afforded some ground to argue that admitting the respondent had partly performed the parol agreement by going with his family to reside with, and attend to the

Judgment.

(a) 1 Wh. & Tud. 625.
(b) 9 Jur. N. S. 1267.
(c) 1 P. W. 618.
(d) 15 Beav. 372.
(e) 5 M. & C. at 177.
(f) 2 Phil. 640.)
(g) 3 Br. C. C. 400.
(h) 2 Cox 271.
(i) 1 Br. P. C. 345.
(j) 1 Moore P. C. 299.
(k) 9 Moore P. C. 131.
(l) 3 Gr. Ch. R. 513.
(m) 5 Gr. Ch. R. 559.
(n) 1 Atk. 12.
(o) 14 Ves. 386.
(p) 3 Jur. N. S. 655.
(q) 9 Jur. N. S. 888.
(r) 2 D. M. & G. 624.

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care of, the father, it must be taken that he had receded from, and abandoned the agreement, having left the homestead and the charge and care of his father in violation of that which was to constitute, on his part, the sole consideration for the devise of the estate to him. On the other hand his lordship thought the weight of evidence, as regarded the alleged destruction by the father of the will (assuming a will duly executed) was greatly in favour of the respondent, and if the case had turned simply upon the question, whether the will had or had not been destroyed by the testator, the decision must have been in favour of the respondent. The relief granted however was founded entirely on the fact of part performance, which the respondent failed in establishing, and therefore the decree which had been pronounced must be reversed, and the bill in the court below dismissed with costs.

Judgment.

So far as *Charles Black* was concerned his lordship thought there was no good reason for saying that the evidence was not sufficient to shew a will properly executed and unrevoked by the testator: but that, as against the other appellants, he had been unable to arrive at the same conclusion.

ESTEN, V. C.—The will is not proved to have been duly executed. The mere declaration of the testator that he had willed the homestead to *William* does not prove the due execution of the will, and the evidence is wholly insufficient, although it appears that the fact could be proved by the evidence of *Stevenson*, for which purpose an opportunity might be afforded if necessary and expedient. But there is strong reason to think that the will was destroyed. The old man stated the fact to many persons: the defendants assert the fact in their answers; the will was not produced, although every opportunity existed for enforcing its production, and *Charles Black*, who is charged with its suppression, has been under examination. If however the plaintiff thinks it

worth while at his own risk as to costs, to take an enquiry as to the due execution of the will and what has become of it, I for one should be favourable to such a disposition of the case; the old man also said that he had not in fact destroyed it and only pretended to have done so.

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If the will was destroyed there can be no doubt that it was done *animo revocandi*. In that case the right of the plaintiff would depend upon the representation or promise, and he would stand in the same position as if no will had ever been made, for the will having been revoked at law, the plaintiff is compelled to seek relief in equity and to ask that he may be placed in the same position as if the will had not been revoked. The answer to such a claim would be that the plaintiff was not entitled to the benefit of the representation, as he had not duly and properly acted upon it, and the question to be decided would be the same as if the plaintiff were asking the fulfilment of the representation in the first instance. Upon this point I think that there has not been such a performance on the part of the plaintiff as entitles him to a specific fulfilment of the representation. *William* certainly removed his family with part of his furniture on the 8th and remained until Sunday the 11th, attending probably to the old man and performing his part of the arrangement: on the Sunday he departs with the acquiescence of the old man, but on the understanding, I think, that he would return shortly, and that his wife and family would attend to him properly during *William's* absence. *William* does not return during the old man's life-time, although that fact perhaps might not be material; but the wife on the Monday deserts the old man, taking with her not only the rest of the children but also the boy who had been waiting on him for three months previous, and when asked to return, or to permit at least the boy to return, refuses. The visit of the boy and girl from Tuesday till Wednesday seems immaterial. The wife returns indeed on Saturday, busies herself about the house, stays over night and prepares breakfast on Sunday

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morning, but the old man is angry, speaks harshly to her; appears not to like to see her in the house, so that *Charles* advises her to leave the room or the house, and she does leave the house and goes to *Mr. Gilbert's* on the Sunday. I do not think that this desertion was condoned, and think that as the plaintiff must be responsible for the acts of his agents, and considering the large proportion which it bears to the whole time and opportunity afforded for performing his part of the arrangement, it disentitles him to the relief which he seeks. On the ordinary doctrine of part performance I should think the acts relied on insufficient. I do not say that this is not an agreement which ought to be specifically performed. It is a purchase of land in a peculiar manner. It is however a parol agreement, and therefore contrary to the Statute of Frauds. It is true that part performance of a parol agreement will take it out of the statute, but it must be such a performance as renders it unjust and a fraud not to fulfil the whole agreement. In the present case the only acts of part performance are the removal of the family and furniture and staying a few days and waiting upon the old man; at his death all that the plaintiff had to do when he found his hopes unfulfilled was to return to his own place, and resume his former occupation. It is true he had lost a little time and perhaps a little money, but this is not I think of sufficient importance to induce the court to set aside the statute, especially as the plaintiff brought it upon himself by his own mis-management, and moreover failed essentially in performing the agreement on his part.

Judgment.

Upon the whole I think that the bill should be dismissed with costs, unless it appear that a will was duly executed and not revoked, in which case the plaintiff would be entitled to a decree.

Per Curiam.—Appeal allowed and the bill in the court below dismissed with costs.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH. 1864.

CROW v. MARTIN.

Description of land—Effect of survey on lands granted before that date.

In the year 1804, a patent from the Crown issued in the name of *James McGarvin*, for lot number twenty, in the first concession of the township of Chatham, containing 200 acres, more or less, and which was described as "commencing in front on the river Thames, at the north-east angle of the said lot, then north forty-five degrees west fifty-eight chains, more or less, *to within one chain* of the lands granted to *Hugh Holmes*," &c. In 1809, a survey of the lands was made, the plan of which shewed a road between the first and second concessions fifty-eight chains from the river, which had never been opened however, and the lands remained in the same position as in the year 1792, when a description had been issued for this lot in the name of one *Watson* as running north sixty-seven and a half chains, more or less to a post, containing 200 acres more or less, but no patent had ever been completed on such description. *McGarvin's* interest in this land was subsequently sold by the sheriff in 1811 under execution, and the conveyance was of lot number twenty, in the first concession, containing 200 acres, more or less; not expressing any metes or bounds. The deed to the plaintiff was made in 1843, and purported to convey the lot (number twenty) as containing 200 acres, "bounded in front by the river Thames; in the rear by the allowance for road between the first and second concessions," &c.

Held, reversing the judgment of the court below, that the plaintiff was restricted in his claim to land to a space of fifty-eight chains from the river Thames, and that he had no title upon which to found an action for trespass to lands to the north thereof, although the same were situate at a distance *greater* than *one chain* from the lands granted to *Holmes*. [A. WILSON, J., dissenting.]

This was an appeal by the defendant from a judgment of the court below, as reported in the twenty-second volume of the reports of that court, page 485, where the pleadings, the evidence, and the exhibits used in the cause are fully set forth.

From that judgment the defendant appealed, for the following amongst other reasons; that the description in the patent through which the plaintiff claimed did not embrace any part of the lands in question, for that all parts of such description, excepting the number of the lot and measurement, being uncertain and erroneous, and not restrictive, such number and measurement must govern, and if so, the result is as above stated: that if the boundary mentioned in the description in *Holmes'*

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patent "as land granted to *Edward Watson*," could be ascertained and rendered certain it was not so done, there being no evidence of any land so granted, nor of the locality of such so called boundary: that the patent through which the defendant claimed vested in the grantee the lot (twenty) in the second concession, though such lot was not then ascertained by survey, and that the patent through which the plaintiff claimed being subsequent thereto could not affect it; and that if the patent through which plaintiff claimed covered the land in question, the deed to the plaintiff did not, nor had the plaintiff proved any title thereto. The respondent (the plaintiff below) contended that the description in the patent, through which he claimed, included the land in question, and that he (the respondent) derived title to such land by the subsequent deeds put in and proved.

Mr. *Anderson*, for the appellant.

Mr. *C. Robinson*, Q. C., and Mr. *Roaf* for the respondent.

Judgment.

DRAPER, C. J.—Trespass to land of the plaintiff commencing in the limit between lots Nos. 19 & 20, in the broken and front concession of the township of Chatham, at the distance of fifty-five chains from the river Thames; thence north forty-five degrees west twelve chains five links; thence parallel with the river Thames eleven chains; thence south forty-five degrees east twelve chains; thence south forty-five degrees west eleven chains to the place of beginning.

Pleas.—1. Not guilty. 2. Land not plaintiff's. 3. Land the defendant's at the time of the alleged trespass.

The plaintiff claimed under a grant from the Crown, dated 28th of August, 1804, to *James McGarvin*, in fee of lot No. 20, first concession Chatham, described therein as all that parcel or tract of land situate in the township of Chatham, containing by admeasurement 200 acres, be the same more or less, being lot No. 20, in

the front or first concession of the said township, butted and bounded as follows: commencing in front upon the River Thames at the north-east angle of the lot, then north forty-five degrees west fifty-eight chains more or less, *to within one chain of the lands granted to Hugh Holmes;* then south forty-five degrees west thirty chains more or less to the limit between lots Nos. 20 & 19, then south forty-five degrees east to the River Thames; then along the water's edge following the several courses of the river against the stream to the place of beginning. Then by a deed dated 25th October, 1811, from *William Hands*, sheriff of the western district, to *William Everett* the younger, upon a sale under execution against the lands of *James McGarvin*, of all that certain parcel or tract of land, situate, lying and being in the township of Chatham, being lot No. 20, in the first concession of the township, containing by admeasurement 200 acres more or less. Then by a deed dated 10th June, 1817, from *William Everett* the younger to *James Woods*, with the same description as in the deed from the sheriff. Then by a deed dated 24th April, 1818, from *James Woods* to *Thomas Martin*, of all that land known and described as lot No. 20, in the front or first concession of the said township of Chatham, containing by admeasurement 200 acres of land be the same more or less * * * butted and bounded as follows, that is to say "in front by the River Thames; *in rear by the allowance for road between the first and second concessions;*" on one side by lot No. 19; and on the other side by lot No. 21. And lastly by a deed dated 28th January, 1843, from *Thomas Martin* to himself, containing a description similar to that in the deed from *James Woods*.

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The plaintiff also put in a copy duly certified, dated 4th September, 1860, of the following description, entered in the books of the Surveyor General's department, "*Edward Watson*, lot No. 20, in front, Chatham, County of Kent, Western District, commencing at a post on the

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river Thames in the limit between lots Nos. 19 & 20, then north forty-five degrees west, sixty-seven and a half chains more or less to another post; then parallel to the general course of the front, easterly, thirty chains more or less to lot No. 21; then south forty-five degrees east sixty-seven and a half chains to the river, and then westerly along the water's edge with the stream to the place of beginning, containing 200 acres more or less. With Land Board certificate. 22 August, 1792. No. 7244. In the margin of this description was the following memorandum: on the 18th August, 1804, the secretary certified that no deed had been completed to *Edward Watson.*"

The defendant objected that this certified copy was not evidence to prove that no patent had been completed; it certainly does not prove the negative stated, but there is no proof of the affirmative, and it seems to have been admitted that no patent for the lot in question ever was issued to *Edward Watson.*

Judgment.

The plaintiff also put in a duly certified copy of letters patent, dated 13th May, 1803, granting to *Hugh Holmes* lot No. 20, in the 2nd concession of the township of Chatham, containing 200 acres, more or less, and bounded thus: "commencing at the S. E. angle of the said tract, *being the N. E. angle of the lands granted to Edward Watson*, then N. 45° W. 66 chains, 30 links, more or less, to the allowance for road in rear of the said lot; then S. 45° W. 30 chains, 26 links; then S. 45° E. 66 chains, 30 links, more or less, to the rear boundary of lands granted to the said *Edward Watson;* then along the said boundary to the place of beginning."

Both parties admitted that the only survey on the ground of which there was evidence, was a survey made by *Thomas Smith*, in 1809, a plan of which was put in. It shewed an allowance for road between the first and second concessions south of the *locus in quo*, which allowance for road was fifty-eight chains distant from the

river, on the course given in the patent issued to *McGarvin*. But the lot with that boundary would contain only 153 acres instead of 200. There were marks found of a blazed line corresponding with this allowance for road, which, according to the evidence, must have been made many years after 1809, and no road was ever opened there. No trace was found, nor any evidence given that a post was ever planted at the distance of sixty-seven and a half chains from the river as is assumed in the description for patent to *Watson*. 1864. Crow v. Martin.

A witness for the defence stated that he had lived near the *locus in quo* forty-six years, and that as long as he could remember there were blazes on the trees marking a straight line as a concession line between the first and second concessions, and the plaintiff's fences were built up to that line and no further.

The plaintiff had a verdict for him subject to the opinion of the court upon what, on this evidence, is the legal boundary between Lot No. 20 in the front range, and lot No. 20 in the second concession; and the Court of Queen's Bench in Trinity Term, 1863, gave judgment in his favour. Against this judgment the defendant has appealed. Judgment.

The appeal gives rise to two questions,—1st. Whether on the pleadings and evidence the plaintiff has shewn any title to the *locus in quo*, assuming that it is part of lot No. 20, in the broken and front concession of Chatham? 2nd. Whether the premises as described in the declaration, or rather that portion of them on which the trespass was committed, are part of lot No. 20 in the said front concession?

I assume the identity of the concessions designated as the broken, the front, and the first concession.

The sheriff's deed of the 25th October, 1811, conveying "lot No. 20 in the first concession," though it mentions no boundaries, does, I have no doubt, convey

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whatever land upon evidence appears to be embraced within the actual limits of the lot so named, but this deed gives no information as to those actual limits.

The same observation applies to the deed from *William Everitt* to *James Woods*. The deed however from *James Woods* to *Thomas Martin* is different. It contains a description of the lot, and bounds it on the rear by the allowance for road between the first and second concessions which was laid out on the ground in 1809, while this deed bears date in 1818; and the deed to the plaintiff contains a precisely similar description.

According to the evidence given by a surveyor at the trial, the distance from the river Thames to this road allowance is fifty-eight chains, and the patent for this lot describes it as commencing on the river at the north-east angle of the lot and running thence north forty-five

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degrees west fifty-eight chains more or less to within one chain of the lands granted to *Hugh Holmes*, evidently contemplating a road allowance between the first and second concessions. Taking into consideration only this patent and the subsequent deeds of this lot I feel no doubt that the plaintiff, under them alone, establishes no right or title to any land north of this allowance for road. The government intending to grant lot No. 20 in the first concession to *McGarvin*, and assuming it to contain 200 acres, described it by metes and bounds, and made its depth from the river fifty-eight chains, terminating as appears when the description is applied to the ground at the allowance for road between the first and second concessions. The description however says, to within one chain of the lands granted to *Holmes*, and it is argued for the plaintiff that the distance given, fifty-eight chains, is a mistake, because that distance will not reach to within one chain of the lands granted to *Holmes*. I think there are two answers to this argument, 1st, that the northern extremity or rear of the first concession is reached, and the patent to *McGarvin* is only

for land in the first concession, and 2nd, that if the sheriff's vendee and *Woods* could by possibility claim more, yet the plaintiff, under the deeds of 24th April, 1818, and 28th January, 1843, is bounded in the rear by the allowance for road between the first and second concessions, and he sues for a trespass committed to the north of this road allowance. For these reasons I conclude that judgment should have been given against the plaintiff, on the ground that he has not proved title to the *locus in quo* as described in his declaration, for he has named no lot, but has only described a piece of land commencing 55 chains from the river, on the limit between lots 19 and 20 in the broken and front concession of Chatham, and lying further from the river than the point of commencement. It is true that his title covers 58 chains from the river, but the trespass was committed still farther back, and beyond the allowance for road between the first and second concessions.

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I am of opinion the judgment should be reversed, and the postea given to the defendant. Judgment.

ADAM WILSON, J.—I consider it to be entirely a question of fact whether, in 1811, the sale by the sheriff of lot No. 20, in the 1st concession, included that lot, according to its original grant and survey, or according to what it was, if it is to be considered as governed by the survey of 1809.

In *Doe d. Dunlop* v. *Servos* (*a*) a person who held lot No. 5 by patent, and who had occupied part of lot No. 4, as and conceiving it to be a part of No. 5, was held entitled to defend it under the description of lot No. 5.

In *Anstee* v. *Nelms* (*b*) it was held that a devise of all the testator's lands in the parish of Doynton passed the lands in question, although a portion of it was in Doynton, and the rest of it was in fact in the parish of Weeks and Absom, *Pollock* B., said, "If the land was

(*a*) 5 U. C. Q. B. 284. (*b*) 1 H. & N. 225

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reputed to be in Doynton, then the testator meant to give it. He did not mean that if on investigation this piece of land, which he supposed to be in Doynton, should turn out to be in Weeks and Absom, it should not pass; he never intended that the question should depend on the parochiality of the subject matter of the devisee if, in common with others, he thought that the land was in Doynton, it passed by that description." * * * * * *

"By the gift of land in a parish, a testator means to pass that which he understands; that which is generally understood to be in the parish—a subsequent discovery of the true parochiality will make no difference; if it were otherwise, a will would mean one thing in 1804, and another in 1855." *Bramwell*, B., asks, "What is the primary signification of the words 'in the parish of Doynton?' is it that which shall be proved to be in Doynton, or that which is commonly reputed to be in Doynton. I hold the latter to be the natural meaning of the words." There are other illustrations put in this case which strengthen the opinions of the learned judges. In *Dodd* v. *Birchall* (*a*) *Martin*, B., remarks, "In order to understand the meaning of the instrument, you should put yourself in the position of the grantor and grantee, and read it with all the knowledge they had at the time upon the subject; having assumed this position, the writing is to decide the rights of the parties."

Judgment.

The survey of 1809 could not take from the patentee the land which the Crown had granted to him. As respects him and his rights, he and they continued after that survey as they did before; his land was still in the first concession; there was no road allowance *through* his land; it continued to run, after 1809, in the same place, between himself and *Holmes*, as it did before that time.

(*a*) 8 Jur. N. S. 1180.

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If, however, a part of it be presumed to have had an imaginary line, called an allowance for road running, near to the rear of it, established by the survey of 1809, the authorities shew that the portions of it outside of this imaginary line, and for some purposes in the second concession, may have a reputation, by name, of being in the first concession.

This more particularly applies when there is no evidence that the sheriff or any one else knew of the survey of 1809, and when the allowance for road professed to have been laid out by it has not been, in fact, opened out to this day.

If the patentee, by his description, intended to grant what he knew and understood to be the land in the first concession, that land will pass, although it is not all in the first concession, and the same rule, I conceive, must apply to the sheriff, as his duty was to sell all the debtor's lands, if necessary, for the satisfaction of the debt, and whatever would have passed by reputation if conveyed by the debtor should, and I conceive will, pass by reputation when sold by the sheriff.

Judgment.

When, therefore, the court was asked to say on the evidence what was the legal boundary between number twenty in the first range, and twenty in the second range, I felt, and still feel, that if the court were to determine it simply as a matter of evidence, and precisely as a jury would do, that the weight of evidence was in favour of the plaintiff; but I am nevertheless of opinion that it was not a fit question for the court at all, and that it should have been specifically found upon by the jury.

The objections to mere questions of fact being submitted to the court to settle upon, are strongly pointed out in the case of *Jones* v. *Tapling*, (*a*) and I think the present case is another instance of the danger and inconvenience of it.

(*a*) 9 Jur. N. S. 462.

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I am not satisfied the conclusion I came to before was wrong, and therefore my opinion is against the appeal; but I am quite certain it would have been better for the court to have remitted the case for the jury to determine, than to have assumed the responsibility of settling it for them.

Per Curiam.—Appeal allowed; the judgment of the court below reversed, and the postea ordered to be delivered to the defendant. [A. WILSON, J., dissenting.]

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

TODD v. CAMERON.

Action for rent accrued during existence of mortgage held by assignee of reversion—Estoppel—Liability of mortgagee of term to pay rent.

The owner of lands created a mortgage thereon in fee, and afterwards granted a lease of the same premises for twenty-one years, the lease being silent as to the existence of any incumbrance; and subsequently conveyed the premises to C. upon certain trusts, subject to the mortgage, which mortgage was afterwards assigned to P., who proceeded to a foreclosure and sale of the premises on default being made in payment, and the same were under a decree of the Court of Chancery sold, subject to the lease, and the fee therein was conveyed to the purchaser by a deed, duly executed by the owner of the equity of redemption, the assignee of the mortgage, and C. the grantee named in the trust deed; the purchaser as part of the same transaction giving to C. (the trustee) a mortgage securing part of the purchase money, which mortgage was subsequently discharged by certificate of payment duly registered. It appeared that the lessee for years had assigned his interest, and that the same had been mortgaged to T. by assignment and not by sub-lease. The rent reserved by the lease having been allowed to run into arrear, during the existence of the mortgage from the purchaser under the decree to C., an action was brought therefor (after the discharge of the mortgage) in the name of C. against T. as assignee of the term.

Held, affirming the judgment of the court below, that T. was liable to pay this rent, notwithstanding he had never entered into possession of the premises, and that the effect of the conveyances was such that T. was estopped from disputing the right of C. as reversioner to enforce payment thereof. [ESTEN, V. C., dissenting.]

This was an appeal from a judgment of the Court of Queen's Bench in a cause pending therein, in which the respondent was plaintiff and the appellant was defend-

ant. The facts giving rise to the action are sufficiently set forth in the report of the case of *Jones* v. *Todd*, in the 22nd volume of the Queen's Bench Reports, at page 37, and in the report of this case in the court below at page 390 of the same volume.

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From that judgment the defendant *Todd* appealed, on the following, amongst other grounds: that the deeds under which the plaintiff claimed shewed that the estate of plaintiff was not a part of the reversion of *Stanton* in the premises, but an interest which accrued to the plaintiff under the owner of the legal estate, to whom *Stanton* had conveyed the same before the execution of the lease to *March*: that at the time of the demise in question *Stanton* had only an equity of redemption in the demised premises, and therefore the covenants in the lease are only collateral to the land and not binding on defendant, especially without entry by him into possession of the property: that before action brought plaintiff's estate and interest in the premises had ceased and determined, and the same never was other than a conditional and defeasible estate: that the alleged reversion of *Stanton* never vested in plaintiff, but the same at the time of the commencement of the action was merged and extinguished.

Statement.

Mr. *Galt*, Q. C., and Mr. *A. Crooks*, Q. C., for the appellant.

Mr. *Hillyard Cameron*, Q. C., and Mr. *Anderson* for the respondent.

In addition to the cases cited in the court below, *Duke v. Ashby*, (*a*) *Heney v. Low*, (*b*) *Hill v. Price*, (*c*) *Roche v. O'Brien*, (*d*) *Stokes v. Russel*, (*e*) *Tudor's* Leading Cases on Conveyanceing, 771, *Shelford* on

(*a*) 7 H. & N. 600; 8 Jur. N. S. 236 (*b*) 9 Gr. Ch. R. 265.
(*c*) 1 Dick. 344. (*d*) 1 B. & B. 330.
(*e*) 3 T. R. 678.

1864. Todd v. Cameron. Real Property, 542, *Mayhew* on Merger, 60, *Platt* on Leases, vol. i., pp. 53, 64, vol. ii., pp. 168, 270, 393, 395, 399, were amongst other authorities referred to.

DRAPER, C. J.—The facts of the case, as I find them on the evidence, are as follows:—

1st.—*Stanton* was seised in fee of the premises in question, and on 1st June, 1830, he mortgaged them in fee to *Hugh Carfrae*.

2nd.—*Carfrae* died in 1839, having devised the mortgaged premises, debt and mortgage to his executors.

3rd.—*Stanton*, on 29th February, 1844, leased the same premises to *March* for 21 years, from the 21st March, 1844, and the lessee entered and took possession.

Judgment.

4th.—By lease and release respectively dated 11th and 12th April, 1845, *Stanton* conveyed all his estate and interest in the mortgaged premises to *J. H. Cameron* upon certain trusts, one of which was a resulting trust for *Stanton*.

5th.—*Carfrae's* executors on 4th May, 1849, sold, transferred and assigned the mortgaged premises, &c., &c., to *Patterson* in fee.

6th.—The Court of Chancery, on 9th September, 1851, made a decree in a suit in which *Patterson* was plaintiff, and *Stanton*, *Cameron*, and the *cestuis que trustent* were defendants, ordering a sale, with the master's approbation, of the mortgaged premises, the proceeds to be applied to pay off *Patterson*, and the balance, if any, to be paid to the defendants as the court might direct, the master to settle the conveyances in case the parties differed, and all proper parties to join as the master should direct.

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7th.—The sale took place, subject to the following among other conditions, "that the property was sold subject to the rights of the Crown in respect of any claim thereon in consequence of the said *Robert Stanton*, the mortgagor, having held office under the Crown, and also subject to any judgments outstanding against the said *Robert Stanton*, and that the said property was also subject to a lease thereof granted by *Robert Stanton* to *Charles March* for twenty-one years, from 21st March, 1844, at the yearly rent of £100." This was on the 27th July, 1853, and *Charles Magrath* was the purchaser for £1420.

8th.—By indenture dated 27th July, 1853, made between *Patterson* of the first part, *Cameron* of the second part, the *cestuis que trustent* of the third part, *Stanton* of the fourth part, *Magrath* of the fifth part, and *Jones* of the sixth part; *Patterson* according to his estate, &c., as mortgagee and at the request and direction of *Magrath*, testified by his being a party, bargained, sold, and released, and *Cameron* according to his estate as trustee, and at the request and direction of *Magrath*, bargained, sold and released, and the *cestuis que trustent* at the like request, &c., of *Magrath*, remised, released and quitted claim, and *Stanton* at the like request, &c., of *Magrath*, granted, bargained, sold, released, ratified and confirmed unto *Jones*, his heirs and assigns, the same premises *habendum* to *Jones* in fee, subject as stated in the condition.

Judgment.

9th.—By indenture dated 27th July, 1853, reciting the trust deed of April, 1845, the sale of the premises, by order of the Court of Chancery, to *Jones* for £1420, of which *Jones* had paid £750, and was to secure the remaining £670 by mortgage to *Cameron*, *Jones* conveyed the premises to *Cameron* in fee, to secure the payment, &c.

10th.—On 21st March, 1855, *Cameron* distrained on *March* for rent.

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11th.—On 2nd September, 1861, the mortgage given by *Jones* to *Cameron* was satisfied and discharged.

12th.—This action is brought by *Cameron* for the rent from the 21st March, 1855, to 1st September, 1861.

The title of defendant is as follows:—

29th February, 1844.—*Stanton* having the equitable fee only, (being mortgagor in fee in possession,) leased to *March* for twenty-one years, from 21st March, 1844; *March* entered into possession.

1st August, 1853.—*March* in consideration of £500 assigned his lease, estate and interest to *Philpotts*.

17th August, 1853.—*Philpotts* mortgaged the term to the defendant.

Judgment.

26th October, 1860.—Decree in a foreclosure suit, brought on that mortgage ordering a sale.

14th December, 1861.—Sale of the term as mortgaged to the defendant.

The plaintiff's right to recover depends exclusively upon his being the assignee, during the period in which the rent claimed fell due, of the reversion in fee in *Stanton*, which arose as between him and *March* out of the lease of 29th February, 1844.

After the lease and release of April, 1845, *Stanton* had neither legal nor equitable estate in the premises except indeed the resulting trust in his favour contained in that release, nor can I understand any principle or construction of law by which he could on the facts as they appear be held to be in, as of his former estate. I do not understand that the decree being not merely one

of foreclosure but directing a sale also, has the less effect on the rights of all the parties before the court in the foreclosure suit. By the conveyance made in pursuance of the decree, the legal estate which theretofore was in *Patterson* became vested in *Jones* with all its incidents, while the equitable estate which *Stanton* had as mortgagor was with all its incidents extinguished and at an end.

If as is said by Lord *Hardwicke* in *Casborne v. Scarfe* (*a*) a foreclosure is considered as a new purchase of the land by the mortgagee, a like effect must attend the sale of the estate under the decree, for it must vest in the purchaser all that would have vested in the mortgagee by an absolute foreclosure, and, as I understand, after such a decree the mortgagee can convey an unimpeachable title without the concurrence of the mortgagor. The decree that all proper parties shall be joined, it is said, is rather to secure the purchaser against any empty outstanding estate in the mortgagor, and those claiming under him, than because he has any actual interest to convey.

Judgment.

But I have failed to convince myself, though my first impressions were the other way that the decree or the conveyance made under its authority, put an end to the reversion by estoppel as between *Stanton* and those to whom he subsequently conveyed, and *March* and those who have acquired his interest. I assume it to be beyond question that the lease of 29th February, 1844, created such a reversion, and that such reversion was *prima facie* a reversion in fee, and if *Stanton* had subsequently acquired any estate in the premises it would have fed that estoppel.

Then is this reversion vested in the plaintiff. The lease and release of April, 1845, were certainly sufficient to pass it, and were as plainly intended to do so, and

(*a*) 1 Atk. 606.

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it thereby was I assume vested in him. If it did not pass from him to *Jones* by the conveyance of July, 1853, it must still be in him, nothing else is shewn which would divest him of it. If it did pass to *Jones*, then by the mortgage in fee made by *Jones* to the plaintiff it would be re-conveyed to him, and either way he had it during all the period for which he is now claiming rent.

If so, the plaintiff establishes his right to recover. The argument in the defendant's favour proceeded mainly on the assertion that *Stanton* having only an equity of redemption at the time he leased to *March*, leased only what he had; and that the reversion expectant on the determination of that term, was of the same nature as *Stanton's* actual interest, namely, a pure equity, and that it either merged in the legal estate when the two were united in *Jones* or it was barred or extinguished by the decree of foreclosure.

Judgment.

The answer to this appears to me to be that the lease of 1844 says nothing as to the nature or extent of *Stanton's* estate or interest, but purports and professes to convey a legal estate, a term of twenty-one years, and the reversion that arises by estoppel, because *Stanton* had no estate out of which he could create the term, must be a legal and not an equitable reversion, and in the absence of any thing to the contrary, the intendment must be that it was a reversion in fee: that the foreclosure suit instituted by the mortgagee in fee could not affect this reversion, which arose out of a transaction long subsequent to the mortgage, and to which the mortgagee was neither party nor privy; that a decree of foreclosure would not have vested it in the mortgagee, nor will the sale under the decree vest it in the purchaser, for it is altogether outside of and unconnected with the mortgage, and is independent of any and every actually existing estate, and if it vested in the purchaser it was by force of the apt words of conveyance used by the parties thereto, who were entitled to this reversion by

estoppel and not by force of the decree. The condition of sale, that it was subject to this lease, would rather strengthen than militate against this conclusion. 1864. Todd v. Cameron.

For these reasons I am of opinion that the judgment of the court below should be affirmed.

ESTEN, V. C.—The facts of this case are these:—*Robert Stanton*, owner in fee of the premises in question on 1st June, 1830, made a mortgage of them in fee to *Hugh Carfrae*, for the purpose of securing £600 and interest. *Carfrae* departed this life in July, 1839, having made his will duly attested, bearing date 18th December, 1838, and thereby gave all his property to *Anne*, *Thomas* and *Robert Carfrae* and *James Leslie*, on certain trusts, and appointed them executors. They proved the will. On 29th February, 1844, *Robert Stanton* granted a lease of the mortgaged premises to one *March* for twenty-one years at a rent of £100 a year, which *March* covenanted to pay; and *Thomas Carfrae* having died, the surviving trustees and executors, namely, *Anne* and *Robert Carfrae*, and *James Leslie* by indenture of assignment, dated 4th of May, 1849, transferred the mortgage to *Patterson*, previously to which, however, and on the 11th and 12th of April, 1845, *Robert Stanton* by indenture of lease and release of these dates had conveyed his equity of redemption in the mortgaged premises to the plaintiff in fee, upon certain temporary trusts for the benefit of his children, *William*, *Sophia* and *James Stanton*, with an ultimate reversion or resulting trust in himself. *Patterson* filed his bill of foreclosure on the mortgage against *Robert*, *William*, *James* and *Sophia Stanton* and the plaintiff, and on the 9th of September, 1851, the usual decree for sale was made in default of payment of the mortgage money at the time appointed, and afterwards, and on the 16th of April, 1852, an absolute order of sale was pronounced, and the premises were duly offered for sale and purchased by *Magrath* for the sum of £1420, subject to the rights of the Crown in conse- Judgment.

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quence of *Robert Stanton* having been an accountant of the Crown, and to all judgments outstanding against him, and subject also to the lease granted by him to *March* as before mentioned. By direction of *Magrath* the premises were conveyed to *Jones*, who was either the real purchaser or had taken an assignment of the purchase; and *Jones* having paid the amount due to *Patterson* on the mortgage, and other sums as agreed, amounting in all to the sum of £782 18s. 1d., made a mortgage to the plaintiff as trustee under the indenture of 12th of April, 1845, for securing the balance of the purchase money, amounting to £637 1s. 11d., upon the trusts of that indenture. The legal estate in fee, therefore, in the premises is vested in Mr. *Cameron*, the plaintiff, as mortgagee in trust. *March* assigned the lease for twenty-one years to *Philpotts* by indenture of 1st August, 1853, who mortgaged it to the defendant *Todd* on the 17th of same month of August, and *Todd* having filed a bill of foreclosure on the mortgage, a sale was ordered and the residue of the term was sold and purchased, I presume, by *Todd* before the rent which is demanded in this action accrued.

Judgment.

To sustain the verdict and judgment of the court below, it must appear that the respondent, Mr. *Cameron*, was entitled to the reversion immediately expectant on a legal term of twenty-one years vested in the appellant Mr. *Todd*. *Todd's* term originally was beyond doubt carved out of the equity of redemption, and was in the eye of the law existing only by estoppel, and as to third parties was in fact no estate at all. If *Jones*, taking only from *Paterson*, had conveyed to any other person than *Cameron*, confessedly the action could not have been maintained by that person. The right to maintain the action therefore must rest upon two grounds: one that the *Stantons* and *Cameron* joined in the conveyance to *Jones*; the other, that the legal estate has come to *Cameron*, who claimed directly under *Stanton*. With regard to the first ground, it would not appear to

be sufficient. When an estate is conveyed by a mortgagee under a decree for sale made on the mortgage, he conveys the estate in the same plight as it was on the day the mortgage was executed, and the estate conveyed is paramount to all subsequent titles. The purchaser is no more bound by a lease granted by the mortgagor after the creation of the mortgage, than a purchaser at law under execution would be bound by a lease created after the delivery to the sheriff of the writ under which the purchase was made. Suppose it was a second mortgage that had been created and not a lease, and that the second mortgagee was not a party to the suit, it could never be that on the conveyance to the purchaser the doctrine of estoppel would apply, for the result would be to vest the legal estate in the second mortgagee, whereas the only effect that follows is that the second mortgagee is not bound by the decree, but may redeem the estate, and so the lessee in the present case could redeem the estate. The concurrence of the *Stantons* and *Cameron* in the conveyance to *Jones* was unnecessary. They could not have been compelled to join in the conveyance.

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The purchaser under decree cannot require the concurrence of the mortgagor in the conveyance; he gets the legal estate from the mortgagee and the beneficial interest under the decree as it was at the date of the mortgage. The estate which *Jones* acquired was the legal estate vested in *Patterson*, and the equitable estate which *Stanton* conveyed to *Carfrae*. He required the concurrence of the *Stantons* and *Cameron*, *ex majori cautela*, but he got all they could give him and more under the decree, and he certainly did not intend to take one jot less than the decree gave him. Their conveyance therefore was, I think, inoperative on the principle of *quod tacite inest nihil operatur*. All the estates which they purported to convey were in fact destroyed by the decree and the conveyance executed in pursuance of it. The consequence is that *Jones* did not take the

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estate by estoppel and was not bound by the estoppel, and could have ejected *Todd* from the demised premises. The mortgage which he made to *Cameron* was derived entirely out of his estate. *Jones* received the estate which *Stanton* had at the moment of the execution of the mortgage to *Carfrae*, under an obligation or contract to make a mortgage to *Cameron* to secure the balance of the purchase money. But it was *Jones'* estate and no other that was mortgaged, and that estate was the identical estate that *Stanton* had *eo instanti* that he executed the mortgage to *Carfrae*.

With regard to the reservation of the lease by the conveyance to *Jones*, it would appear to me that it could not have the effect of creating the relation of tenant and reversioner between *Todd* and *Jones*. For that purpose it must amount to a demise to *Todd* for the residue of the term of twenty-one years with remainder to *Jones* in fee. So the reservation as to the judgments outstanding against *Stanton* would not subject the estate of *Jones* to those judgments at law. Mr. *Jones*, I presume, did not undertake to pay what might be due to the Crown or all the judgments outstanding against *Stanton*. The object of the reservation probably was to protect Mr. *Stanton* in reference to his covenants for title. At all events, it could, I think, only give the lessee a right to protection in equity against any disturbance that might be attempted by the purchaser.

Judgment.

The present case is on all fours with Lord *Downe v. Thompson*. (*a*) There a mortgagor after the mortgage granted a lease, and then joined with the mortgagee in conveying to a purchaser, the mortgagee being paid off out of the purchase money, and the balance being paid to the mortgagor, or rather his assignees—he having become bankrupt. It was held that he could maintain ejectment against the lessee, although he had received from him two years' rent, and could also maintain an

(*a*) 9 Q. B. 1037.

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action for use and occupation after six months' notice. If *Patterson* and *Stanton* had joined in conveying the premises to *Cameron*, this case would have been identically the same with Lord *Downe v. Thompson*, but it can make no difference that *Stanton* had previously conveyed to *Cameron*, or that *Patterson* conveyed to *Jones*, and *Jones* to *Cameron*, and that the *Stantons* and *Cameron* joined with *Patterson* in conveying to *Jones*. If no foreclosure had occurred, and no conveyance to *Jones*, or by *Jones* to *Cameron*, both parties would have been estopped, and the result would have been the same had *Stanton* redeemed the estate, and either before or afterwards conveyed to *Cameron:* but *Cameron* having acquired the legal estate of *Patterson* and *Jones*, neither of whom was bound by the estoppel, is not bound by it in respect of the estate derived from them; and *Cameron* not being bound by the estoppel, *Todd* is not bound by it, and can shew the truth which he has done, and the consequence is that no legal term exists in *Todd*, or reversion immediately expectant upon it in *Cameron*, and therefore that this action cannot be maintained and that the judgment of the court below should be reversed. Even if the circumstance that the reversion in fee by estoppel had been conveyed to *Cameron* by *Stanton* previously to the conveyance by *Jones* to *Cameron*, it cannot have any effect under the circumstances of the case; for *Cameron*, the trustee, with the consent of his *cestuis que trustent*, all *sui juris*, joined with *Patterson*, the mortgagee, and his *cestuis que trustent* in conveying the estate to *Jones*, whereby the trust estate came to an end, and the whole legal and equitable fee simple became vested in *Jones*, so that at the time of conveyance to *Cameron* he did not claim the reversion by estoppel.

Judgment.

Per Curiam.—Appeal dismissed with costs. [*Esten*, V. C., dissenting.]

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ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY..

KERR v. AMSDEN.

Registered judgment—Lien—9 Victoria, chapter 34, and 13 & 14 Victoria, chapter 63.

Held, per Curiam, affirming the judgment of the court below, that in order to a judgment creditor retaining the lien created by the registration of his judgment it was incumbent on him to lodge a writ against lands with the sheriff within one year after the registration of his judgment; in other words, if such a judgment creditor had neglected to lodge his writ against lands for a year after the entry of his judgment, and an unregistered judgment creditor or a subsequently registered judgment creditor had lodged his writ before him, the sale effected under such execution will be freed and discharged of any lien created by such registered judgment.
[VANKOUGHNET, C., dissenting.]

This was an appeal from a decree of the Court of Chancery in a cause wherein *Thomas Cockburn Kerr* and *John Brown* were plaintiffs, and *Samuel Amsden* and *Angus McCollum* were defendants, the bill in which
Statement. set forth that on the 28th of December, 1857, plaintiffs recovered judgment in the Court of Common Pleas against *Amsden* for £306 11s. 3d., which was duly registered in the registry office of Haldimand on the 30th of the same month, at which time *Amsden* had divers lands, &c., in that county; and the same judgment was re-registered on the 28th December, 1860: that part of the amount had been recovered by virtue of writs issued on the judgment, leaving still due £160 with interest and costs; that defendant *McCollum* claimed an interest in those lands by virtue of a sale and conveyance by the sheriff of Haldimand, and prayed payment of the amount remaining due, or in default a sale. The answer of the defendants set up that by virtue of writs of *fi. fa.* against the lands of *Amsden*, the same had been sold and conveyed to *McCollum*, and that no writ against lands had been sued out on the judgment recovered by the plaintiffs within the period required by law.

The following admissions were made and signed by

counsel:—that the plaintiffs did not place *fieri facias* lands in the sheriff's hands until the 28th December, 1859; that before filing bill, and on the twenty fifth February, 1860, all *Amsden's* lands were duly sold at sheriff's sale to defendant *McCollum*. The execution of the sheriff's deed to *McCollum*, dated the sixteenth day of April, 1860, and the issuing of the writs mentioned therein. That at date of registration of plaintiffs' judgment *Amsden* had the land afterwards sold to *McCollum;* that the writs of *fieri facias* under which lands were sold were upon registered judgments, recovered and registered subsequently to plaintiffs'; that the writ of *fieri facias* lands in suit of *Pratt* v. *Amsden* was placed in the sheriff's hands on the 15th July, 1858; that under such writ *Amsden's* lands were duly advertised for sale within the year, and were offered for sale on the third day of November, 1859, but not sold for want of bidders; that the *fieri facias* was returned on the seventh day of November following, and a *vendi-tioni exponas* duly issued under which *Amsden's* lands were sold on the 25th of February, 1860; that the bill was filed on the 18th of May, 1861, placed in the sheriff's hands for service on the 21st of May, 1862, and served on the 23rd of the same month, and that during the whole time between filing and service defendants resided in Dunnville and might have been served.

Statement.

The cause was set down to be heard upon the pleadings and the foregoing admissions, and was heard before his honour Vice-Chancellor *Esten*, who, after taking time to consider the case, dismissed the bill with costs.

The plaintiffs being dissatisfied with that judgment, re-heard the cause before the full court, when the decree which had been pronounced was affirmed with costs, his lordship the Chancellor intimating that he dissented from the views expressed by the learned Vice-Chancellors, whose judgments were as follows:—

ESTEN, V.C.—The question in this case is whether where

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a registered judgment creditor has failed to deliver a writ against lands to the proper sheriff within a year from the entry of his judgment, and an unregistered judgment creditor has lodged his writ against lands in the hands of the sheriff before the registered judgment creditor, the sale of the lands under the writ on the unregistered judgment is, or is not subject to the equitable charge created by the registration of the prior registered judgment? I have already expressed an opinion upon this point in a judgment which I delivered alone; but I thought it my duty to re-consider the question, since the argument of this appeal, and I adhere to the opinion which I before expressed. The clause in which the question arises is a very singular one. In the 9th Victoria, chapter 34, it occurs in the form of a proviso in the 13th section of the act: but in the Consolidated Statutes of Upper Canada it forms a separate clause by itself. It seems to be founded on a misapprehension of the law,

Judgment.

or rather of the true construction of the act in which it occurs. It seems to indicate that the legislature thought that but for that proviso an unregistered judgment, followed by a writ in the sheriff's hands, would prevail against a registered judgment. But this, I apprehend, was an error in construing the 13th section. The sale under the unregistered judgment would convey only such estate as the debtor had, at the date of lodging the writ upon that judgment in the sheriff's hands; but this estate was subject to the registered judgment, supposing the writ to have been lodged after the registration, and must have gone to the purchaser subject to such registered judgment. And when the registered judgment creditor afterwards proceeded to a sale, under his own judgment, either at law or in equity, he would offer for sale and would convey to the purchaser such estate as the debtor had at the date of the registration of his judgment, and such conveyance would therefore over-reach the conveyance under the writ upon the unregistered judgment. Such would have been the effect of the 13th section without the proviso; but from

the terms of the proviso we must suppose that the legislature did not intend that the 13th section should have that effect, but intended that an unregistered judgment with a writ should prevail over a registered judgment, and the proviso was introduced in order to limit that result to cases in which the registered judgment creditor had neglected to lodge his writ for a year after the registry of his judgment, and that they intended only that a registered judgment should over-reach subsequent sales and conveyances by the debtor, which, in fact, was the real effect of a docketed judgment in England, when docketing was practised. It might have been fairly questioned whether the proviso in the 13th section of 9th Victoria, c. 34, was not repealed by the 13th and 14th Victoria, c. 63, but I should have thought that it was not so repealed.

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The effect of repealing it would have been to have given absolute priority to the unregistered judgment with a writ, according to what we must deem to have been the meaning of the legislature in framing the 13th section, or to have preserved the priority of the registered judgment, notwithstanding the neglect to lodge the writ within a year after entry, neither of which results would have accorded with the intention of the legislature. I should have thought, therefore, that the proviso in question was not repealed by the 13th and 14th Victoria, chapter 63, and the matter is placed beyond dispute by the 22nd Victoria, chapter 89, sec. 52, which preserves or retains it in the form of a separate clause. The result is that if a registered judgment creditor should neglect to lodge his writ against lands with the sheriff for a year after the entry of his judgment, and an unregistered judgment creditor should lodge his writ against lands before him, the unregistered judgment will "take effect" against the registered judgment; and the question is, what is the effect of this provision?

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The meaning of the legislature, I think, was that a

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registered judgment should not only bind the lands, as against subsequent purchasers from the debtor, but should have priority over unregistered or subsequently registered judgments, although, with prior writs in the hands of the sheriff, provided the registered judgment creditor should issue and lodge his writ within a year from the entry of the judgment. If, however, he should neglect this precaution the unregistered judgment, with a prior writ in the sheriff's hands, should "take effect" against the registered judgment. The intention of this provision must be that where the sheriff should proceed to a sale, the judgment creditor, who had the first writ, should be paid in full, in preference to the registered judgment creditor. This is the only way in which the unregistered judgment could "take effect" against the registered judgment. The whole object, however, of this provision will be defeated if it should be deemed that the equitable charge created by the registered judgment should, although the legal lien would not, prevail over the unregistered judgment with the prior writ in the sheriff's hands; because, in that case, the sheriff's sale, under such writ, will be subject to the registered judgment; the purchaser will deduct the amount of it from his purchase money, and the unregistered judgment creditor, instead of being paid first, as the legislature intended, will be paid second or not at all.

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Thus, supposing the estate to be worth £300, and the registered judgment to be for £200, and the unregistered judgment with the first writ to be also for £200, the purchaser, understanding that he purchases, subject to the registered judgment in equity, will deduct the amount of it from his purchase money, and will offer only £100 for the estate, and the unregistered judgment creditor must be satisfied with it; and the purchaser, in order to preserve his estate, will have to pay the full amount of the registered judgment to the holder of it. In other words, the registered judgment will be paid in full first, and the unregistered judgment, with the first

writ, will be paid second, and only in part or not at all, contrary to the intention of the legislature, which must be considered, according to this construction, as saying *uno flatu*, that the unregistered judgment shall be paid first at law, and the registered judgment shall be paid first in equity; which would be an absurd result. 1864. Kerr v. Amsden.

The truth is, that when the legislature passed the 13th and 14th Victoria, chapter 63, they did not intend to alter the 13th section of the 9th Victoria, chapter 34, but only to explain it. They re-enacted and explained it *eodem intuitu* with which they originally passed it in the 9th Victoria, chapter 34; and the second section of the 13th and 14th Victoria, chapter 63, must have been enacted *eodem intuitu;* for the same intention must be attributed to the whole act and to every part of it. Now the intent of the 13th section of the 9th Victoria, chapter 34, must have been that registered judgments should bind lands in the hands of subsequent purchasers from the debtor, but should be postponed to a registered judgment with a prior writ, otherwise the proviso which immediately follows would have been insensible. Judgment.

Before this act the first writ prevailed; the legislature meant that it should still prevail, and such is the true construction of the 13th section without the proviso, which qualified this priority, and limited it to cases in which the registered judgment creditor should neglect to deliver his writ for a year after entry of his judgment. The effect of the entire section was that a registered judgment should bind the lands as against subsequent purchasers from the debtor, and should even prevail over an unregistered judgment with a prior writ, unless the registered judgment creditor shall neglect to lodge his writ for a year after entry of his judgment.

Then came the 13th and 14th Victoria, chapter 63, which began by explaining the 9th Victoria, chapter 34, section 13, but as I have already observed, did not mean to alter it.

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The effect of the first section of the 13th and 14th Victoria, chapter 63, without the proviso being understood, would have been that all registered judgments would have been postponed to unregistered judgments with prior writs *ipso facto*, because such was the meaning and true construction of the 9th Victoria, chapter 34, section 13, without the proviso; and this section was re-enacted in the 13th and 14th Victoria, chapter 63, with the same meaning with which it was originally passed, in the 9th Victoria, chapter 34. The second section of the 13th and 14th Victoria, chapter 63, must have been enacted with the same intent as the first, because the legislature could not pass two clauses in the same act of parliament with a different and inconsistent intent. The first and second sections are to be read as if contained in one section, as in fact they are in the Consolidated Statutes, and the meaning of them, independently of the proviso, is that registered judgments shall bind lands in the hands

Judgment.

of subsequent purchasers from the judgment debtor, in the same manner as docketed judgments in England formerly did, and should form an equitable charge on such lands, but shall be postponed to an unregistered judgment with a prior writ, unless (such is the effect of the superadded proviso, expressed in the 9th Victoria, chapter 34, understood in the 13th and 14th Victoria, chapter 63, and re-expressed in the Consolidated Statutes) the registered judgment creditor should deliver his writ to the sheriff within a year from the entry of his judgment, in which case the registered judgment shall prevail over the unregistered judgment, notwithstanding the priority of the writ, both at law and in equity. This construction necessarily flows from the consideration that section thirteen of 9th Victoria, chapter 34, and section one of the 13th and 14th Victoria, chapter 63, mean the same thing, and section two of 13th and 14th Victoria, chapter 63, means the same thing as section one; that these clauses *per se* gave an absolute priority to the unregistered judgment with the prior writ, in accordance with the previous law, but that this *prima facie* opera-

tion was qualified by the proviso to the 13th section of 9th Victoria, chapter 34, and the effect of the whole is to give priority to the registered judgment both at law and in equity; provided, and only provided, it is followed by a writ delivered to the sheriff within a year from the time of entry. This construction seems to me to be a reasonable conclusion from the premises upon which it is founded, and effectuates the intention of the legislature, which would otherwise be entirely defeated Before the 9th Victoria, chapter 34, the first writ bound the lands, and this had been the case ever since we had a constitution. The legislature were so impressed with the forcible prevalence of the writ, that they assumed it in passing the 13th section of the 9th Victoria, chapter 34, and engrafted the proviso upon that section for the protection of the registered judgment. The 13th section, as illustrated by the proviso, must receive this construction, and must receive the same construction in the 13th and 14th Victoria, chapter 63, section 1, in which it is only explained, and the second section of the act must have been passed with the same intent as the first. I think therefore that a sale under a prior writ upon an unregistered judgment is not subject to a prior registered judgment, upon which a writ has not been lodged within a year from its entry, and that the purchaser at such sale holds discharged from such registered judgment.

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Kerr v. Amelen.
Judgment.

SPRAGGE, V.C.—The question seems to divide itself into two points. First, whether the proviso to 9th Victoria, chapter 34, is confined in its operation to judgments registered under that statute, and does not apply to judgments registered under 13th and 14th Victoria; and next, whether, if it applies under the later statute, it applies at law only, or both at law and in equity. The first point has been decided in the affirmative in both the common law courts, and the question remains whether, in equity, the priority obtained by registration is preserved, although the priority is lost at law.

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The statute 9th Victoria gave to registration the effect of creating a legal charge, but provided that it should retain its efficacy for a year only; 13th and 14th Victoria continued the same effect to registration, and gives the further effect of creating an equitable charge; the proviso is not repeated in terms, but is held still to apply at law; the legal charge is still lost, unless execution against lands be lodged with the sheriff within the year.

If without lodging the writ the charge in equity is preserved, the sale by the creditor who has obtained priority at law must be subject to the equitable charge, and his priority is merely nominal. The words of the statute are, "shall take effect," and it is the respective judgments, not writs of execution—that are to take effect, and the words are general, not confined to law or equity. If the equitable charge continues without *fi. fa.* lodged, then the judgment, having priority at law, does not take effect against the registered judgment, but the registered judgment does very effectually take effect against it. The legislature was dealing with priorities as between judgment creditors, and prescribed under what circumstances priority should be obtained, should be preserved, and should be lost. It evidently contemplated the registered judgment creditor pursuing his legal remedy, for it inflicts the loss of legal priority, at least, upon its neglect. Suppose, then, the legal remedy preserved, as was the case in the common law cases reported, both having writs in the sheriff's hands, the contest at law has been, which judgment should be first satisfied—which should "take effect" against the other. It does not seem to have occurred either to the litigants or to the court that the priority all the while was really with the registered judgment creditor. Strictly, of course, the court of law had only to do with the moneys realized by the sale, but the whole contest was futile if the equitable charge remained.

Judgment.

It does seem strange, certainly, that in order to

preserve an equitable charge, it should be necessary to lodge a common law writ. If some other act had been prescribed as the condition for keeping alive the priority of the charge, *e. g.*, re-registration, there would be no apparent anomaly, but I do not think we are at liberty to say in the face of the words of the act, comprehensive as they are, that the omission to do what the act prescribed cannot have the effect as to the equitable charge which is given to it in general terms by the act, merely because it appears to us unnecessary or anomalous.

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The question may be shortly put in this way: a writ of *fi. fa.* against lands is placed in the hands of the sheriff; there is a registered judgment against lands in the same county; the judgment with writ lodged (either unregistered, or, as is held at common law, registered after the other judgment) cannot take effect against the prior registered judgment, unless the party having such prior registered judgment had neglected to lodge his *fi. fa.* for a year; but if such neglect has taken place, then the judgment with the writ lodged prevails and "takes effect" against the prior registered judgment. Does it take effect against it in any practical sense, if the equitable charge still retains its precedence over the legal charge? The question upon either construction of the statute has its difficulties; but, upon the whole, I think that the lodging of the writ within the year is made necessary by the statute, to preserve the equitable as well as the legal charge. Judgment.

The plaintiffs thereupon appealed from the decree, and the order affirming the same, on the following, amongst other grounds:—

That the judgment of the appellants being registered prior to those judgments, under writs of execution issued on which the lands of *Amsden* were sold, and prior to the delivery of such writs to the sheriff of the proper

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county, formed a lien on the said lands prior to such judgments, and the executions issued thereon, and such sale was and should be declared to be subject to such lien; that the judgments, under executions issued on which, the said lands were sold, being judgments registered subsequently to that of the appellants, and it not appearing that such executions were issued within one year after such registration, formed liens on *Amsden's* lands subsequent to that created by the appellants' registered judgment, and such executions could not give them a priority over it or change the relative priorities of such liens; that the statute 13th and 14th Victoria, chapter 63, gives the registered judgment of the appellants a priority or lien in equity which cannot be affected by the proviso in 9th Victoria, chapter 34, which would seem to require a legal writ of execution against lands, to be issued and placed in the hands of the proper sheriff within one year to maintain such priority—the statute, 9th Victoria, chapter 34, not giving the registered judgment creditor the remedies in equity or creating the equitable lien which the statute 13th and 14th Victoria, chapter 63, does.

Judgment.

The respondents on the other hand contended they were entitled to retain the decree which had been so pronounced on the following amongst other grounds: that the appellants lost the priority created by the registration of their judgment by not issuing execution within one year; that the judgment, under execution, upon which the respondent *Amsden's* lands were sold, had priority over the appellants' judgment; and that the effect of the appellants' neglect to issue execution was to destroy the priority of the appellants in equity as well as at law.

Mr. *Strong*, Q. C., for the appellants, referred to and commented on *Moffatt* v. *March*, (*a*) *Neate* v.

(*a*) 3 Gr. 623.

Duke of *Marlborough*, (*a*) *Godfrey* v. *Tucker*, (*b*) *Rolleston* v. *Morton*, (*c*) *Whitworth* v. *Gaugain*, (*d*) *Russell* v. *McCullough*, (*e*) *Coppin* v. *Gray*. (*f*) 1864. Kerr v. Amsden.

Mr. *Roaf*, for the respondents, cited amongst other cases *The Commercial Bank* v. *The Bank of Upper Canada*, (*g*) as to the principal point involved; and also an anonymous case reported in 1 *Vernon*, 171, as to the delay in proceeding after bill filed.

After taking time to look into the authorities the appeal was dismissed with costs, his lordship Chief Justice *Draper* stating that he felt it unnecessary to make any lengthened note on the case, or to say more than that he fully concurred in the judgments given by the learned Vice-Chancellors in the court below; and was therefore of opinion that the appeal should be dismissed with costs.

Judgment:

VANKOUGHNET, C., retained the opinion expressed on the re-hearing of the cause. The statute having declared that the registration of the judgment shall have the same effect as if the debtor had executed a writing under his hand creating a charge upon his lands, his lordship was of opinion, that in any sales made by the sheriff under writs of execution issued upon other judgments the lands of the debtor must be sold subject to the lien in equity created by such registration.

Per Curiam.—[*Vankoughnet*, C., dissenting.] Appeal dismissed with costs.

(*a*) 3 M. & C. 407.
(*b*) 3 New. R. 20.
(*c*) 1 Dru. & War. 171.
(*d*) 3 Hare, 416.
(*e*) 1 K. & J. 313.
(*f*) 1 Y. & C. C. C. 205.
(*g*) 21 U. C. 2 B. 91.

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[*Before the Hon. Arch. McLean, Ex-C. J., President,* the Hon. W. H. Draper, C. B., Chief Justice of Upper Canada, the Hon. P. M. Vankoughnet, Chancellor, the Hon. W. B. Richards, C. J. C. P., the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Adam Wilson, and the Hon. Mr. Justice John Wilson.*]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

THE BANK OF MONTREAL v. HOPKINS.

Mortgagor and mortgagee—Estoppel—Representation affecting third parties.

The owner of real estate created a mortgage thereon, and afterwards sold and conveyed a portion of the property by a deed containing absolute covenants for quiet enjoyment, freedom from incumbrances, &c., taking from the purchaser a bond conditioned for the payment of a proportionate amount of the mortgage debt. *Held*, reversing the judgment of the court below, that the fact of the purchaser holding such absolute conveyance was not such a representation to the holders of the mortgage as warranted them in executing to the purchaser a release of his portion of the estate from the mortgage, and afterwards looking to the mortgagor for payment thereof [VANKOUGHNET, C., dissenting.]

Statement.

The facts of this case sufficiently appear in the report thereof in the court below in the 9th volume of *Grant's* Reports, page 495.

From the decree then made the defendant appealed.

Mr. *Strong*, Q. C., and Mr. *Crickmore* for the appellant, contended that the decree should be reversed on the following, amongst other grounds: that the covenants in the deed from *Hopkins* to *Kerby* were not intended to operate between any other parties than the parties to the deed, and the respondents should not have relied or acted thereon without further enquiry; that as between the parties to the said deed, the covenants were in equity of no force or effect, it clearly appearing that they were not in conformity with the agreement of the parties, and the deed would be reformed on the ground of mistake; that the respondents did not execute the release in pursuance of such covenants, or rely thereon in any way,

* Was absent when judgment was pronounced.

but made a bargain with *Kerby* to release to him for £20, without regard to the rights between *Kerby* and the appellant; that the appellant never authorised the respondents to execute the said release, or assented thereto, or concurred therein; that the respondents were guilty of gross negligence in executing such release to *Kerby*, without enquiry of the appellant, inasmuch as the appellant lived in the city of Toronto, near the agent of the respondents, and they could, with less inconvenience and expense, have applied to the appellant, than to have searched the registry office; that but for the said release *Hopkins*, by redeeming the respondents, could have enforced the payment "out of the released portion" of the £241, the amount of the said mortgage which *Kerby* had assumed and agreed to pay; and also that there was nothing due to the said respondents at the date of the said release.

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This case is easily distinguished from the one relied on by the majority of the court below. In *Chandler* v. *Ford* the writing was addressed to the trustee, by which the trustee was informed that the *cestui que* trust was about to transfer the property, and a transfer was endorsed on the declaration of trust, both of which were in the hands of the transferee.

Statement.

Here, however, it is shewn the agent of the bank, *McCutchon*, did not in reality act on the words of the deed, for he states himself that he had searched the registry office to see if any incumbrance had been created by *Kerby;* in fact the covenants in the deed were inaccurate—the first two of them were broken as soon as made, and *McCutchon* must be held to have been aware of this fact, as he, of course, was well informed as to the fact of a mortgage being in existence. It is putting the matter altogether too strongly against the appellant to treat the fact of the deed containing such covenants as a representation. The appellant was, no doubt, responsible for the legal

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effects of the covenants, whatever they might be, but not for the inferences which third parties might draw from the language of the conveyance, referring to *Schoole* v. *Sall*, (*a*) *Palmer* v. *Hendrie*, (*b*) *Fisher* on Mortgages, page 146.

Mr. *Harrison* and Mr. *Hodgin* for the respondents, contended that the decree was proper, and ought to be maintained on the following, amongst other grounds, namely, that the appellant, by giving to *Kerby* a deed with full covenants for title, and for further assurance, enabled him to induce the respondents to believe that the appellant was bound to protect the land against their mortgage, and all other incumbrances, and if *Kerby*, by means of such deed, misled the respondents, it was in consequence of the act of said appellant in giving said deed; that it was the clear duty of the appellant, if he intended to restrain *Kerby's* use of the covenants in such deed, to notify the respondents of the bond or agreement given by *Kerby* for a portion of the mortgage debt, or to have registered the same, as against the land, and he cannot now make the respondents liable for his own neglect; that the respondents were under no obligation to enquire of the appellant whether the sealed instrument which he had given to *Kerby* really meant what it expressed, or whether there was any secret trust between them; and as between the appellant and respondents, the appellant, in the absence of notice, is estopped from denying the effect of the contract plainly set forth in his deed; that the covenants in the deed clearly showed that the appellant intended to throw the balance of the mortgage debt upon the remainder of the estate, and in the absence of notice the respondents acted rightly in recognising that intention; that in equity, the effect of the deed and bond between the appellant and *Kerby* was to give the appellant a personal remedy against *Kerby*, or a vendor's lien on the land; and for all that appears the appellant

Statement.

(*a*) 1 Sch. & L. 176. (*b*) 28 Beav. 341.

has still that remedy and lien, and can enforce it; that the appellant is in no way prejudiced by the release executed by the respondents, for if the release had not been executed, the appellant could not, owing to the covenants in the deed, enforce any part of the mortgage debt against any purchaser from *Kerby*, against whom he cannot now enforce it; and that the appellant, after notice of the release to *Kerby*, continued to make payments to the respondents on account of the said mortgage, and thereby waived his right to complain of the release executed by them, referring, amongst other cases, to *Howard* v. *Hudson*, (*a*) *Pickard* v. *Sears*, (*b*) *Gregg* v. *Wells*, (*c*) *Sweeting* v. *Pearce*, (*d*) *Maither* v. *Maidstone*, (*e*) *Young* v. *Grote*, (*f*) *Ex parte Swan*. (*g*)

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VANKOUGHNET, C., retained the opinion expressed by him in the court below.

RICHARDS, C. J.—The case of *Ford* v. *Chandler* is in my opinion distinguishable from this, for *Ford* merely held the property as a naked trustee, and in that capacity would be bound to convey it to *Chandler's* assignee. A transfer absolute on its face was presented to him, and in accordance with his duty, he conveyed the land which he held to the person to whom the party for whom he held it had conveyed it. He had previously been advised by *Chandler* that he intended to sell the land, and was therefore quite justified in carrying out what he supposed was the wish of the real owner of the property. But here the Bank of Montreal could not, under any circumstances, have been compelled to transfer any portion of the mortgaged premises to *Kerby*, or to release any portion of them to him, unless they had been paid the full amount of the mortgage money, so that in this respect what they did was not done under any legal obligation, nor at the request of the defendant.

Judgment.

(*a*) 2 Ell. & Bl. at page 13.
(*b*) 6 Ad. & Ell. 469.
(*c*) 10 Ad. & Ell. 90.
(*d*) 7 C. B. N. S. 449.
(*e*) 18 C. B. 273.
(*f*) 4 Bing. 253.
(*g*) 7 C. B. N. S. 400.

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The only ground on which it can be urged that they are not to be held responsible for the consequences of their voluntary, and, so for as this defendant is concerned, officious act, is that the defendant, by executing the deed referred to, made a representation in relation to *Kerby's* purchase from him which was communicated to the plaintiffs, and that it could properly be inferred from that representation that the defendant intended to pay the mortgage money to the Bank, and therefore they were justified in releasing *Kerby's* portion of the property from the mortgage. As I understand the reasonable applicability of the rule on this subject, (which it is said is not properly an estoppel, but is reduced to the somewhat homely adage that a man shall not be allowed to "blow hot and cold," in relation to the same transaction,) it is this, that the representation must be made with the intention of being communicated to the party who acts upon it, and with the intention of having it so acted on by him. I have extracted the language of several of the judges in reference to this subject, which it seems to me will bear out this view of the rule. In *Freeman* v. *Cooke*, (*a*) *Parke*, Baron, made the following observations: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and *believe that it was meant that he should act upon it, and did act upon it as true*, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission where there is a duty cast upon a person by usage of trade, or otherwise, to disclose the truth, may often have the same effect." In argument he says, "You do not mean to argue that if any person makes a mis-statement without any intention that another party should act upon it, that in such a case he is bound;" again, "where a person makes a representation under such circumstances that a reasonable man

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(*a*) 2 Ex. 654.

might naturally infer that it was intended that he should act upon it," then he is bound. 1864.

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In *Bedford* v. *Bagshaw*, (*a*) *Pollock*, C. B., says, "Generally if a false and fraudulent statement is made with a view to deceive the party who is injured by it, that affords a ground of action. But I think there must be always this evidence against the person to be charged, viz., that the plaintiff was one of the persons to whom he contemplated that the representation should be made, or a person whom the defendant ought to be aware he was injuring, or might injure."

In *Howard* v. *Hudson* (*b*) it is stated, "If a party wilfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called, but it operates as a bar to receiving evidence contrary to that representation, as between those parties. * * * The party setting up such a bar to the reception of the truth must show both that there was a wilful intent to make him act on the faith of the representation, and that he did so act." Judgment.

Erle, C. J., *In re Swan* says, "It is a universal rule of law that when a party makes a representation to another, whereby the situation of the latter is altered, he is bound thereby. * * * * * This is the general principle which in various forms pervades all the cases cited, and the very numerous class often referred to with the case of *Pickard* v. *Sears*." He added, referring to the judgment of *Wood*, V. C., in *Taylor* v. *The Great Indian Peninsular Railway Company*, (*c*) "The party who claims to benefit by this doctrine of estoppel must show that he has acted in the transaction where he was deceived with ordinary caution. * * * * * * The doctrine limited to

(*a*) 4 H. & N. 548. (*b*) 2 E. & B. 10.
(*c*) 28 L. J. Ch. 285.

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throwing the loss from the party who has acted with due care to the party who has caused the loss by wilful imprudence must always operate to promote the substantial interests of commerce without producing any pernicious uncertainty." In the case then under consideration, he proceeds to enquire if the person who claimed that the estoppel should operate for his benefit had been wanting in ordinary care as to his part of the transaction.

In the same case *Keating*, J., said, at page 441, "Had the parties against whom the application was made contributed to the misfortune by any laches on their part, or by improperly omitting to do any thing which could have prevented it, the case might have been different. In *Edmunson* v. *Thompson et al.*, (*a*) plaintiff refused in January, 1860, to supply one of the defendants, *Thompson*, with yarn. *Thompson* advertised for a partner, when it was agreed between *Blakely*, the other defendant's father, and *Thompson*, that a partnership should be entered into between his son and *Thompson* on the 27th of January. After this agreement, *Thompson* wrote plaintiff that he had got a partner. On the next day defendant *Blakely* came to *Thompson's* place, and took a seat in the counting house; gave orders to the clerks, and transacted other business to all appearance as a partner of the firm. On the 2nd February, *Blakely's* father had another interview with *Thompson;* said he had altered his mind, and wanted his son to be a clerk, and not a partner. To this *Thompson* assented, and the new arrangement was reduced to writing on the 14th February. Plaintiff, after the communication from *Thompson*, supplied him with yarn between the 9th February and 13th April, and both defendants were sued for the price of the yarn. It was held plaintiff could not recover, as *Blakely* was not a partner in fact when the yarn was delivered, and that he could not be considered as holding himself out as a partner in fact to the plaintiff, as it was not shewn that the facts in relation

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(*a*) 31 L. J. N. S. Ex. 207.

to the partnership, and the conduct of defendant in relation to it ever came to plaintiff's knowledge, or that he was induced to supply the goods on the faith of them.

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If before the Bank can be justified in releasing *Kerby's* lot, it ought to appear that the representation was such that a reasonable man would suppose that it was intended to be communicated to the Bank, and to be acted on by them: was then this representation so intended? I think not. I need not repeat what is said by Vice-Chancellor *Esten* in giving his judgment, as to the practice which has prevailed to a very great extent in this country, of using forms of conveyances which do not express the real transaction between the parties. Looking at the instrument as it is set out it seems to be the usual printed form of conveyance containing the ordinary covenants of seisin, and for quiet enjoyment. Now nothing in it was calculated to deceive the plaintiffs. They knew as a matter of fact that the premises conveyed to *Kerby* by defendant were encumbered, and that in that respect the covenant was not true: they in fact were not deceived on that point. It cannot be supposed that the defendant intended the contents of the deed should be shewn to the plaintiffs, and that they would be deceived by it so as to induce them, in any way, to change their position.

Judgment.

It may be argued, however, that this representation or covenant that *Kerby* might enjoy the premises free from any mortgage, was a request to the plaintiffs to discharge the portion of the premises contained in the deed from the mortgage.

If such had been his intention it could have been much more easily carried out by a simple request to the Bank to do so.

I am by no means satisfied that the giving of the deed, with the covenants referred to, exhibited so much reckless-

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ness on the part of the defendant as was assumed on the argument. If the deed were shewn to a stranger, notwithstanding the covenants which appear in it, he would have searched the registry office, and would then learn there was a mortgage attaching on this and other lands held by the Bank of Montreal, and as a prudent man he would not purchase until that was removed. If it was shewn to the Bank, the defendant would assume that the Bank would *know* that the mortgage was not satisfied, and would not act in relation to the matter until it was.

I think if the Bank had acted with ordinary prudence they would not have been deceived by the mere use of the ordinary printed form of conveyance in the way they appear to have been. From the papers it appears that the gentleman who acted for the Bank as well as the defendant resided in Toronto, and the deed from him as well as the release by the Bank to *Kerby* were executed at Toronto, and in such a case a prudent man would have obtained the direct authority of the defendant when he could have been referred to so easily and readily before doing an act which might so seriously affect his interests without his consent.

Judgment.

I think the plaintiffs' case fails as to the amount in dispute, because, looking at all the facts of the case, the form of the deed and the situation of the parties, no prudent man ought to have supposed that the covenant referred to in the deed to *Kerby* made by the defendant was any representation or request to the Bank that *Kerby's* lot should be released from their mortgage, and that the loss which has taken place has arisen from their own laches, and therefore the Bank alone ought to suffer therefrom.

I have seen my brother *Adam Wilson's* judgment, and do not deem it necessary to touch on the points elaborated by him, but consider that many of his arguments have peculiar force against the plaintiffs' right to recover.

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ADAM WILSON, J.—The mortgage of which the respondents are the assignees, was given upon a property having 97 feet for frontage on Victoria Street, in this city, by a depth of 122 feet.

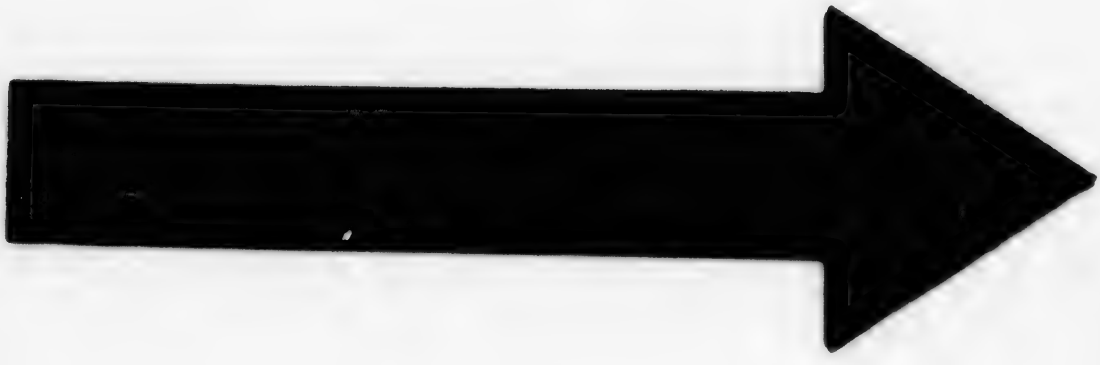
This property was subsequently divided by the persons in possession and who were entitled to the equity of redemption into three separate parcels, *Patrick* having the most northerly part, consisting of 41 feet frontage.

Hopkins, the appellant, having the central part, consisting of 26 feet frontage, and *Kerby* the southerly part, consisting of 30 feet frontage.

Patrick and *Hopkins* bought the whole of it jointly, *Patrick* retaining the northerly 41 feet for his share, and conveying the remaining 56 feet to *Hopkins* for his share. They were to have paid off the mortgage then upon the premises, in proportion to their respective frontages. *Hopkins* subsequently conveyed the southerly part to *Kerby*.

Judgment.

By the arrangement between *Kerby* and *Hopkins* *Kerby* was to have paid off the whole balance then due upon the respondent's mortgage, and he gave *Hopkins* a writing to that effect, and *Hopkins* very unadvisedly gave to *Kerby* a deed expressed to be in fee simple, and with full covenants that the grantor was then seised of a perfect, absolute and indefeasible estate of inheritance in fee simple without any manner of reservation, limitation, &c., or any other matter to alter, charge, change, encumber or defeat the same, and that he had full and absolute authority to grant, &c., to the grantee, his heirs and assigns in manner and form aforesaid, and that the grantee, his heirs and assigns, should peaceably enter into, have, hold and enjoy the premises, &c, without the let, &c., of the grantor, his heirs or assigns, or any other person or persons whomsoever; and that free and clear, and freely and clearly acquitted, &c., of and from all arrears of taxes and assessments, and all former



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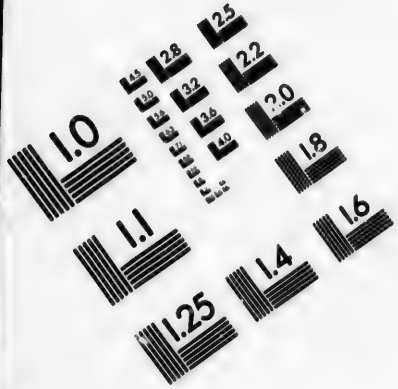

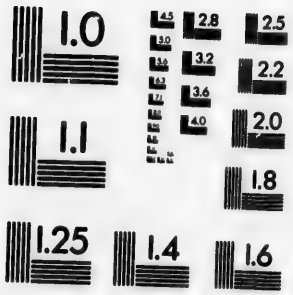

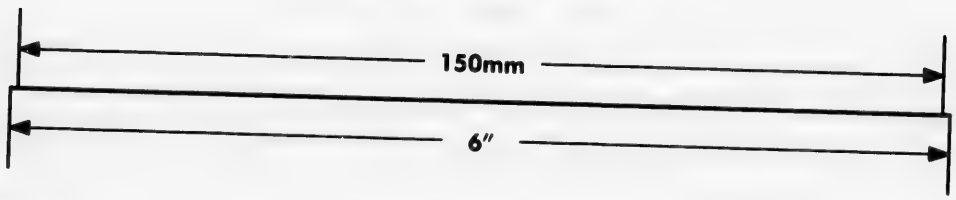

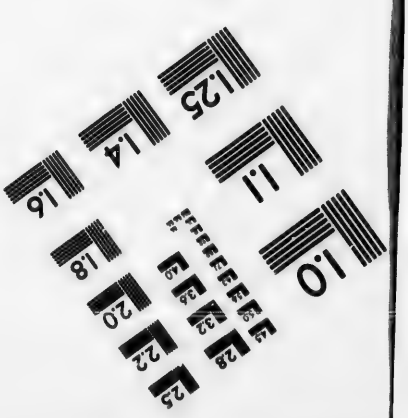

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conveyances, mortgages, &c., &c., and of and from all manner of other charges and incumbrances whatsoever; and that the grantor, his heirs and assigns, would make further assurance.

Hopkins did not register the agreement of *Kerby* to pay the mortgage debt, but *Kerby* did register the deed which *Hopkins* gave to him.

This deed was of course manifestly untrue, as *Hopkins*, *Kerby*, and the Bank well knew.

Kerby could have brought an action upon it against *Hopkins* the moment it was executed, for it was broken as soon as it was delivered. The damages he would have recovered if he could not have been entirely defeated by an equitable plea would have been, however, only nominal.

Judgment.

Shortly after receiving this deed, *Kerby* applied to Mr. *McCutchon*, who was acting at this time as the agent of the Bank, with respect to this mortgage, for a release of his portion of the premises.

The Bank, without requiring payment of the mortgage money, which it had clearly the right to do, made a special bargain with *Kerby* in which, among other things, it is recited that "it has been agreed between the said parties hereto that thirty feet of the said lot, number forty-five, should be released from the said above recited indenture of mortgage, and re-conveyed to the said *Joseph T. Kerby*," then the Bank, in consideration of twenty pounds paid by *Kerby*, granted the land in question to *Kerby*, his heirs and assigns for ever.

Kerby registered this release, and sold the land so acquitted from the mortgage, to a *bona fide* and innocent purchaser.

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Hopkins has therefore lost the recourse upon this land which he had so long as it was in *Kerby's* hands; his own especial loss, above the amount which was payable to the Bank, is, of course, solely to be attributed to himself, because he placed the power in *Kerby's* hands to defraud him of the amount which he had not protected by registration or notice, but the amount of the mortgage money due to the Bank he alleges has been lost to him by the conduct of the Bank in releasing the land to *Kerby*, without requiring from him payment of their debt.

Judgment.

For the Bank, it may be said that they might or might not have released to *Kerby* with or without payment of their debt at their option; that although they need not have done so without payment, and could not have been required to do so, yet they might if they pleased release without at all prejudicing their right upon the rest of the land for their claim, because they say they were induced to believe, and did believe, that *Hopkins* had undertaken to acquit *Kerby's* land from the mortgage, and to assume it himself, from the nature and character of the covenants which he had entered into with *Kerby*, and that they had no notice of any thing whatever existing between *Hopkins* and *Kerby* to alter or modify the effect of these covenants, and as they have been induced to grant the release innocently and in good faith by *Hopkins'* act and means, he must bear the loss, if any there be, which has been occasioned by his own deed, so calculated to mislead, and which has in point of truth misled them; in answer to which *Hopkins* may say that, however his deed might have imposed upon others who did not know of the state of accounts between him and *Kerby*, or however justified the Bank might have been in entering into any new transaction with *Kerby*, upon the faith of this deed being entirely true, it could not warrant the Bank in releasing on *old claim* without payment, unless at their own peril, as to what the actual condition of things then was between *Kerby* and himself. That in fact it was

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the duty of the bank to have insisted on payment before giving the release, and as in truth they have injured *Hopkins* by this breach of duty, they must bear the consequences of their own malfeasance.

And the question is which of these views is the correct one?

If the Bank in dealing with this old debt is to be considered in precisely the same light as a purchaser without notice, or as a new mortgagee in advancing a fresh loan, the respondents should succeed; but if they are to be treated as trustees of the owner of the equity of redemption, whose duty it was to render to him the land mortgaged, upon receiving payment from him, and who lost their right to call for the debt whenever they had deprived themselves of the power to render up the pledge, then the appellant should prevail. The case of *Ford* v. *Chandler* was relied upon by the respondents as a case directly in point in their favour.

Judgment.

It will be observed that in that case *Ford* was a mere trustee for *Chandler;* when he conveyed the property to *Codd* he had done all he was bound to do, and this he was compellable to do upon a duly executed transfer of *Chandler's* rights and interests. He had no claim or lien of any kind upon the property for any debt or demand against *Chandler* or against any other person interested in the property; so that on releasing the trust estate he could or might jeopardise or prejudice the rights of others by any individual claim to be afterwards put forward by himself; and moreover, having been told by *Chandler* he was about to sell his interest; he saw by the assignment that he had actually done so, and nothing can be plainer than that the assignee stood in the assignor's place, and was entitled to get in the dry outstanding trust which was in *Ford's* hands.

Whereas in the case in hand, while the Bank was a trus-

tee for *Hopkins* they were also his creditors and the creditors of all others interested in the property, and if by releasing the land to *Kerby*, who had not paid them their debt, they exonerated the security or fund which was answerable for it, they cannot hold *Hopkins* or any other accountable to them for its payment, because they cannot now deliver over to him the lien which they ought to have preserved for his benefit. If this act can be justified as against *Hopkins* so as to sustain this foreclosure suit against him, it would be equally justifiable against *Morphy* the mortgagor; and the Bank might assert the right of releasing the whole land to *Hanscome* without payment from him of one shilling of the money, and then demand the whole debt from *Morphy*, although they could not give him back the land for his indemnity. This would be really making a gift to *Hanscome* of the land and making *Morphy* pay for the gift. The same thing might have happened again when *Hanscome* assigned to *Patrick*, and surely it can be no answer for the Bank to make, that by so general an assignment being made they were induced to deal with the assignee as the owner of the property acquitted from the mortgage debt, and to treat the assignor as alone responsible for that debt, for they were not bound to treat the assignee as acquitted from any portion of the debt. No one could acquit him or his land from that debt but themselves, and it was their own interest if not their duty, not to have acquitted him without being first paid, unless at the risk of giving up all claim upon every other person, in respect of the same debt, who might happen to be affected by their act. And so in like manner the same rule must apply in the case of *Kerby* the purchaser or assignee of a part of the premises as in the case of *Hanscome* and *Patrick*, the assignees of the whole premises. The Bank was bound on production of an assignment or deed from the person who had the right of redemption to treat the purchaser or assignee as the representative of that right which the conveyance professed to grant, and to permit him to

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pay the debt if he offered to pay it. This was all the Bank was bound to do; and more than this—this was all the Bank ought to have done or had the power to do, where other interests were concerned. The Bank had not the right to discharge one foot of the mortgaged land to *Kerby*, to *Hopkins'* prejudice. They were not imposed upon, nor could they have been by the production of *Kerby's* deed, because they were not required by it in any way whatever to release *their* claim. *Hopkins* may have released *his* claim as he had a perfect right to do if he pleased; but what had that to do with the Bank claim? Their place was still to have given up nothing without being first paid their demand. This being their plain and manifest duty, it would have been supposed that it would have been alike their interest to have pursued such a course. All that was required of them was to mind their own business and not concern themselves with the affairs of other people.

Judgment.

If they had taken the money from *Kerby* before giving him the release, *Hopkins* and *Kerby* might have settled their matters without trouble or loss on either side; but if they were determined not to mind their own business, which they did know, but to undertake the settlement of the transactions between *Hopkins* and *Kerby*, which they did not know, and were not required to know, they should have taken the precaution to have informed themselves of the nature of these transactions before they dealt with them. By thus doing what they ought not to have done, they have done it not only badly, but wrongly, as might have been expected. They have released a debtor without enquiry and without payment: and the fact is now apparent that they have released the wrong debtor, and as they have done this voluntarily and officiously, it is right they should bear the consequences of their own act; and as they have set *Kerby* loose from *Hopkins*, they must set *Hopkins* in turn loose from themselves. The argument of the Bank is and must be, that if they are the assignees of a mortgage, say for £10,000, and the assignee of the mortgagor,

who has not paid a farthing of his purchase money, and who has covenanted with the mortgagor that he will pay off the whole of the mortgage money, produces to them a deed from the mortgagor, with full and unqualified covenants such as are contained in the deed to *Kerby*, that without notice of any kind to the mortgagor they may grant the land to his assignee wholly discharged from their debt of £10,000, and yet sue the mortgagor upon his covenant at law, and recover it from him; although they cannot convey to him the security of the land for his indemnity, and although he must lose the whole amount of his debt, not wholly by his own act nor necessarily by his own act at all, but because the Bank has, without any special request upon them and without the power of any one to make such a request, conveyed the land away without first procuring payment of their debt.

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This, I think, is rather a serious proposition to be adopted as law, and yet it must be so adopted, if this decree is to be maintained.

Judgment.

The case of *Palmer* v. *Hendrie* is an authority in favour of the appellant. There one *Palmer* mortgaged to *Hendrie: Palmer* then assigned his equity to *Hughes: Hendrie* and *Hughes* then demised to purchasers, and *Hughes*, the owner of the equity, with the consent of *Hendrie*, the mortgagee, received the purchase money and misapplied it. The mortgagee afterwards sued the mortgagor at law on his covenant; the mortgagor filed his bill for a perpetual injunction, as *Hughes* had received more money than the mortgage debt, and the injunction was granted.

The Master of the Rolls says:—"The mortgagee cannot, if he has allowed the purchaser of the equity of redemption to receive the purchase money, sue the original mortgagor for the amount of the money which he has thus allowed to be paid to such purchaser. This

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is one of the first principles of equity." The difference between that case and the one in hand is, that, in that case, the mortgagee allowed the owner of the equity to receive the money; in this case the mortgagee has released to the owner of the equity without requiring the money from him, and in both cases the mortgagee claimed the right to fall back upon an ulterior party; in that case it failed, because the attempt was "in violation of the first principles of equity." The Master of the Rolls also says:—"It is then said the plaintiffs ought to have given *Hendrie* notice of the assignment to *Hughes*, but nothing is more common than for the owner of an equity to sell it without giving any notice to a mortgagee, and nobody could consider this as a badge of fraud, nor do I so consider it."

Judgment.

Most of the cases which were cited for the respondents apply to representations, express or implied, by act or writing of the party, which are claimed to be binding upon him by reason of another person having been misled and having acted upon such representations, as explained in the case of *Pickard* v. *Sears*, and the numerous subsequent cases in the same branch of the law, but they have no bearing whatever upon this case, because nothing which *Hopkins* had done was intended to induce or should have led the Bank to discharge *Kerby* or *Kerby's* land from their own debt. The cases in 7 Common Bench N. S., and in 9 Common Bench N. S., are cases not applicable to the present one in any way, nor are those in 8 Jurist N. S.

It is to confound two very distinct transactions and responsibilities to say that because *Kerby*, with the possession of the deed, could have bound *Hopkins* to discharge the land from this incumbrance as against a *bona fide* purchaser without notice, that he could also authorise the Bank to hold *Hopkins* alone responsible for the debt upon their releasing to *Kerby*.

The case is rather that *Hopkins* had two securities: one to himself, and the other to the Bank, either of which he was entitled to avail himself of; having lost the benefit of his own mortgage by his omission to register, he still had the right to fall back upon the protection of the Bank mortgage, and the question is what right have the Bank, *holding* him as a debtor, to discharge his security without his consent. There are some few principles in the absence of a direct decision which can scarcely be hoped to be met with in such a case, which will, I think, sustain the opinion now expressed, if authority be required, when it should rather have been supplied by the party seeking to maintain the present decree.

The Bank can have nothing upon their mortgage from any one, "but on the condition of re-conveying;" *Schoole* v. *Sall*, and *Tasker* v. *Small*; (*a*) and this they cannot now do. Nor were they compellable to release a part of the property, even on payment of a part of the debt, for the mortgagor must pay, or must redeem altogether or not at all; *Palk* v. *Clinton*. (*b*) They cannot, therefore, now re-convey the property mortgaged in its integrity: the mortgagee can take no benefit of a covenant between the mortgagor and a vendee of the equity of redemption that the latter will pay the mortgage debt, for the mortgagee is no party to the covenant. *Butler* v. *Butler*, (*c*) *Barham* v. *Earl Thanet*, (*d*) *Ex p. Keighly re Stockdale*, (*e*) Nor can the mortgagor take any benefit of an acknowledgment of his title made by the mortgagee to his assignee for the purpose of avoiding the Statute of Limitations, because the mortgagor is no party to the acknowledgment. *Lucas* v. *Dennison*, (*f*) *Batchelor* v. *Middleton*. (*g*) The mortgagee cannot be redeemed by one who has only contracted to purchase the equity of redemption: as between the mortgagor and his vendee,

Judgment.

(*a*) 3 Mil. & Craig 68.
(*b*) 1½ Ves. 48
(*c*) 5 Ves. 534.
(*d*) 3 M. & K. 607.
(*e*) 3 DeG. & S. 588.
(*f*) 18 Sim. 584.
(*g*) 6 Hare, 75.

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the latter has the title in equity, but the mortgagee has nothing to do with their relations: he can only deal with the vendee when the latter has acquired the mortgagor's legal title to demand a re-conveyance of the mortgage property. *Tasker* v. *Small.* The mortgagee cannot release a covenant made by the vendor of the mortgagor so as to prevent the mortgagor from suing his vendor for a breach of it; it is a breach of duty in the mortgagee so to deal with the mortgagor's rights. *Thornton* v. *Court.* (*a*)

If a debtor assign a mortgage to his creditor by way of mortgage, the debtor may still sue his own mortgagor upon default, and if the assignee stay such proceedings, it is equivalent to a discharge of the assignor.

Judgment.

"The *Gurneys* (the assignees) cannot both prevent *Seppings* (the assignor) from releasing his debt from *Nokes*, and at the same time hold him liable for his own debt. * * * If the *Gurneys* think right for other reasons not to let the action go on, they must restore to *Seppings* his own estate, and release him from personal liability to them." *Gurney* v. *Seppings.* (*b*) These references establish two propositions, 1. That the right to enforce payment can only exist where and so long as the creditor preserves his right to re-convey. 2. That the mortgagee has nothing to do with the transactions between the mortgagor and his assignee or vendee; he must still deal with the estate so that no one may be injured. From these propositions it is very clear the Bank has not so acted with the estate in dealing with *Kerby*, and that the damage which has thereby fallen upon *Hopkins* they must indemnify him from.

I am not satisfied that the Bank acted upon *Hopkins'* deed to *Kerby* as the sole inducement for discharging his lands; the release which they gave to him seems rather to have been a private bargain, of which, in con-

(*a*) 17 Jur. 151; 3 DeG. M. & G. 293. (*b*) 2 Phil. 41.

sideration of the premium of £20 to themselves, they acquit the land, than as influenced by the absolute covenants which were contained in his deed. 1864. Bank of Montreal v. Hopkins.

I am not satisfied they have shown any excuse for discharging *Patrick's* land and leaving *Hopkins* solely liable for *Patrick's* proportion of the debt; and I think that whenever the Bank incapacitated themselves from assigning their mortgage in its integrity to the person whom they called upon, or whom they would otherwise have had the right to call upon, for payment of their debt, that they lost all claim to the debt itself, for it is only by reason of their position as mortgagees that they are creditors at all.

Because, therefore, the Bank by their voluntary and officious act have prejudiced the appellant their *cestui que trust* by discharging *Kerby's* land from their mortgage, they must be held to have discharged the appellant from the debt also, and I think the judgment of Vice-Chancellor *Esten* should be affirmed, and the decree of the court below reversed. Judgment.

I may add that I think I should have come to this conclusion without hesitation if it had not been for the contrary opinion of the two learned judges in the court below, but I cannot say I have been at all convinced by their arguments, and in my opinion the decree should have been in favour of the appellant.

JOHN WILSON, J.—The respondents are the assignees of the mortgagee of a piece of land for a given sum. This land, subsequently to the execution of the mortgage, was divided into three parcels, and owned by three parties, in the proportions of twenty-seven, thirty, and forty feet, measured on the front. It is admitted on all hands that each of these parties stood chargeable to the respondents with the payment of a rateable share of the debt due on the mortgage, in proportion to the

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quantity of land which they severally held. The respondents could not release any of them to throw a greater share on the others without their consent. All this the respondents admit, but they say, "You, the appellant, represented to us that you had no claim on the land as against *Kerby*, to whom you sold it, and on this representation we released him." Now the question is whether the deed of conveyance, with the usual covenants, from the appellant to *Kerby*, was such a representation as justified the respondents in releasing *Kerby* and charging the appellant with his share of the money due on the mortgage.

As I understand the law of representation, it amounts only to this: that if a man represents a certain state of facts to exist, which really do not exist, with a view that they shall be acted upon as existing, and the party to whom it is made acts upon that representation, he who untruly made it shall not afterwards be permitted to deny it. This deed did certainly on the face of it carry out the idea, that as against the appellant the land was unincumbered, but the other ingredient was wanting. It was not made with the view of the respondents acting upon it. It was a representation as between themselves, which *Kerby* himself would not have been allowed successfully to hold as true against *Hopkins*.

Judgment.

It does not appear that the respondents acted solely on this representation, for they took £20 for executing the release; this they credited on the mortgage, but it was not a nominal consideration. It was such a sum as no man would have paid who was of right entitled to be discharged from the incumbrance, and the payment of it, or the willingness of *Kerby* to pay it, in the face of the representation which he held as entitling him to a release, should have made the respondents pause and enquire, as otherwise it was their duty to do.

I concur, therefore, with the learned Chief Justice of

the Common Pleas, that it was not such a representation as authorised the release, and with the learned Vice-Chancellor *Esten*, that it was the duty of the respondents to enquire before they executed it. 1864. Bank of Montreal v. Hopkins.

I think the judgment of the court below ought to be reversed.

Per Curiam.—Appeal allowed, and the decree of the court below to be varied by introducing a declaration therein that so much of the mortgage debt as *Joseph T. Kerby* in the pleadings mentioned was bound by the terms of the agreement with the defendant *Caleb Hopkins* to pay, has been discharged. [*Vankoughnet*, C., dissenting.] Judgment.

McGuffin v. Ryal.

Note.—The paragraph on page 418 of this volume, beginning "Because of its perfect immateriality, I think," should be read as follows: "Because of the perfect immateriality *of the issue which the defendant has attempted to raise upon the value*, I think," &c.

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[*Before the Hon. W. H. Draper, C. B., C. J.; the Hon. P. M. Vankoughnet, C.; the Hon. W. B. Richards, C. J. C. P.; the Hon. V. C. Spragge; the Hon. Mr. Justice Hagarty; the Hon. Mr. Justice Morrison, and the Hon. Mr. Justice Adam Wilson.*]

ON AN APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

HARVEY v. SMITH.*

Lien for unpaid purchase money—Infant—Costs.

The purchaser of land from the Crown sold and transferred his right to C. in 1834. C. subsequently transferred his interest to T. H., who entered into possession and remained in such possession until 1839, when he died, leaving an infant son his heir-at-law. About a year after his death his widow assumed to sell the estate to E. H., a brother of her late husband, who entered into possession; and having subsequently procured, from the original vendee of the Crown, an assignment of the same date and in the same words as the one executed by him to C., by means thereof procured from the Crown the patent for the lot in his own name, and mortgaged the property to his brother H. H., who had notice of all the circumstances attending the title, and to whom E. H. afterwards released his equity of redemption. In the spring of 1861 H. H., by means of an ejectment evicted E. H., who up to that time had continued in possession of the property, and in November of that year H. H. sold and conveyed the estate to S., who took without notice, and paid the whole of his purchase money except £175, for which sum the father of S. gave his promissory note for the purpose of facilitating the carrying out of the bargain, S. leaving in the hands of his father certain securities, out of which it was agreed that the father should collect means over and above a sum owing by the father to S. to retire the note, which note, however, was not paid in full, £75 being still due thereon. In 1863 a bill was filed by the heir-at-law of T. H., claiming under the circumstances to be entitled to the estate, and to set the sale to S. aside, which was decreed on the ground that the purchase money had not been paid, so as to entitle the purchaser to plead a purchase for value without notice.

On appeal this decree was reversed, and the bill in the court below ordered to be dismissed with costs. [*Vankoughnet*, C., and *Spragge*, V. C., dissenting.]

The bill in this cause was filed by *Victor Colborne Harvey* against *Robert Smith* (the younger) and her

*The court, in pronouncing judgment, expressed a desire that in appeals the original style of the cause should be retained, and that the profession on knowing the views of the court in this respect would adopt the course suggested; their lordships not deeming it of sufficient importance to make any formal order of court on the subject.

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Majesty's Attorney-General for Upper Canada, setting forth that on the 18th of June, 1831, one *Jeremiah Vigner* became the purchaser of the east half of lot No. 5, in the 3rd concession of Hawkesbury (east) for the price of 12s. 6d. per acre, payable in ten equal annual instalments, upon which he paid the first instalment of the price, entered into possession and occupation of the premises, cleared 15 acres and built a house and barn thereon; and who thereupon, according to the well-settled practice of the Crown, became entitled, on payment of the stipulated price, to receive an absolute grant from the Crown, as was also any one claiming under [illegible]; that on the 8th May, 1834, *Vigner*, for value, by writing under his hand and seal, assigned and transferred his interest in the premises to one *George Clifford*, who entered into the actual possession and occupation thereof, and so remained in such possession until he assigned and conveyed his interest to one *Thomas Harvey* (father of the plaintiff) who went into possession of and cultivated the same by himself or his tenants up to his death, which happened in 1840*; that the said *Thomas Harvey* died intestate, leaving the plaintiff, his only son and heir-at-law, his widow and one daughter his next of kin, him surviving, but no letters of administration were ever granted of his personal estate: that plaintiff, on the death of his father, became entitled to the interest of his father, but being then an infant of six months old, could take no part therein; and his mother, although she had no title thereto, collected and received the rents thereof from the tenants of the said premises under a demise made by his father, upon the expiration of which demise his mother entered into possession of the premises in the year 1840, and put one *Edmund Harvey* (a brother of *Thomas Harvey*) into possession upon some agreement or understanding made between them, but the particulars thereof plaintiff did not know.

Statement.

The bill further stated that in 1856 *Edmund Harvey*

*The evidence of George Harvey, brother of deceased, shewed the death occurred in 1839.

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induced *Vigner* to execute to him an assignment purporting to assign his interest, as purchaser from the Crown, in such half lot for a nominal consideration of ten dollars, upon production of which to the Crown Lands Department and payment of the balance of the purchase money due to the government a patent for the premises was issued to *Edmund Harvey* in his own name, he having concealed from the government the various facts stated, as shewing the title of the plaintiff, and which, had they been communicated, would have induced the government to refuse to issue the patent to *Edmund Harvey*. That in 1858 *Edmund Harvey* executed a mortgage of the premises to his brother *Henry Harvey*, to secure a sum of money alleged to be due to *Henry* by *Edmund;* and that subsequently a release of his equity of redemption in the premises was executed by *Edmund* to *Henry;* and charged that *Henry Harvey* had notice of the claim of plaintiff before the execution of such mortgage and release of the equity of redemption. That subsequently to the execution of such release, and while plaintiff was still an infant under the age of twenty-one years *Henry Harvey*, by indenture, conveyed the premises to the defendant *Smith* in fee simple, who thereupon entered into possession thereof, and has since continued therein and charged *Smith* with notice of the various facts above set forth before the execution of the conveyance to him, and before the payment of the consideration therefor, (if the same had been paid,) and submitted that under the circumstances the plaintiff was entitled to have the patent and the conveyance thereunder set aside and cancelled, and to have a patent of the premises issued to him; or to have the defendant *Smith* declared a trustee and bailiff for the plaintiff, and to have a conveyance of the premises and an account of the rents and profits from him.

Statement.

The prayer was for relief in accordance with these statements, and also for an injunction to restrain *Smith* from alienating or incumbering the premises, which the bill also charged he intended doing.

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The defendant *Smith* answered the bill denying all knowledge of the several facts and circumstances set forth in the bill; claimed the benefit of the statute of frauds and perjuries, and of the registry act, the title having been a registered one; and that at the time of the execution of the deed by *Henry Harvey*, he was paid and satisfied the whole of the consideration money therein expressed, and thenceforth acquitted and released him (*Smith*) therefrom; and claimed also the benefit of want of notice on the part of *Henry Harvey;* before he obtained his conveyance of the premises, and paid the consideration therefor.*

The *Attorney-General* answered, stating his ignorance of the matters and things set forth in the bill and claimed to be dismissed with his costs.

The plaintiff having put the cause at issue, set the same down for the examination of witnesses and hearing at the sittings of the court at Ottawa, in the month of September, 1863, when *Edmund Harvey* was examined as a witness for the plaintiff, who, in his evidence, swore, "I was a brother of the late *Thomas Harvey;* and was at one time in possession of the lot of land in question here; I entered into personal occupation of the place after the death of the plaintiff's mother; she delivered me possession of the place before her death, about a year after her husband *Thomas'* death; *Smith*, the father of the defendant, was then on it; I bought the place from her; she was then claiming through her husband's claim, at least I know of no other; after my brother bought the place he put *Smith* on as farmer; the widow delivered me the possession in presence of *Smith;* and from that time he paid me a share of the crops; one or two seasons my father's family drew away my share of the crops; one year I received it; *Smith* remained his term, three years, on the place, and perhaps something more, and then left, and I entered and put on *Valois* to work the farm on shares with me; I got a paper from *Vigner*, I think before *Smith* left the

Statement.

*Edmund Harvey, in his evidence, swore that Henry Harvey had been made acquainted by him, with all the circumstances of the case, and of the plaintiff's rights, before obtaining his conveyance.

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place, and after my bargain with the widow; when I bargained with her I got all the papers belonging to the place; I was advised by another man to get the paper from *Vigner*, to whom I paid two pounds ten shillings for signing it; the widow got the first year's crop from *Smith* after my brother's death; *Smith* was harvesting when my brother died; as far as I could understand my brother put *Smith* on the place; *George Clifford* had it before this; I heard that my brother bought the place from *Clifford;* I was from home when he bought it, and learned it on my return: my brother was sick at the time, and frequently asked me how *Smith* was getting on with the farm. * * * * I was to pay the widow for the lot, but no amount was mentioned, and I never paid her any thing; I went on to the lot and lived on it after *Smith* left; I made it my home; took *Valois* on to work it; he and his family lived in the house with me; I think *Valois* remained on the lot for at least five years: I then commenced to farm it myself, and remained in possession till I was ejected; I either got the papers from *Vigner* while *Smith* was on the place, or shortly after he left; I had previously gone to the government office at Kingston—the Crown Land Office, I think, with the papers I then had, which I had got from the widow of *Thomas*, to see what I could do about the lot; I was told by a man there to go to another man, who advised me to go back to *Vigner* and get a transfer from him, and not to show the other papers; I sent the transfer from *Vigner* to the Crown Land Office, and got a patent to myself; * * * * at first when I bought I thought the widow could sell the lot; my brother *Henry* lent me some money on the lot; I gave him a mortgage on it; he was living with me at the time; I was not sure at the time I so borrowed that I had a good title to the land. * * * * I was sued by my brother before any agreement with regard to it; * * * I could have paid my brother if he had given me a chance; his refusal is the cause of this trouble here to-day; had he agreed to give me time this suit would not have been brought; I could have settled with my nephew; a year before my brother and myself quarrelled my nephew, the plaintiff, told me he would [not*] put me off the

Statement.

*The word "not," it is evident from what follows this passage, had been omitted in taking the evidence; in addition to which this witness in a subsequent part of his evidence swore that the plaintiff, in con-

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place; but he said *Henry* was pressing me hard and would yet have it; * * * when I first tried to get the patent I wanted to pay up what was due the Crown in my brother's name, and get the patent in my own name; I did not know how I would get a deed to myself, and it was then suggested to me to get a transfer from *Vigner* in my own name; I thought I could get the land by paying up the Crown, and paying back what my brother had paid; I shortly after found out I was wrong, and two or three years after, and before I got the patent, was so advised and told I had better say nothing about it, but try and get it settled up in some way; this was long before I got any money from my brother, long before I gave my brother a mortgage; I told my brother of this, and that I thought I could settle it with my nephew; * * * * before getting this advice my brother *Henry* and I had talked about the matter; I had spoken with another man before; I was told to keep it secret; I expected to get my title right from *Vigner* some day or other; I used sometimes to think that *Vigner* might some day or other trouble me; I think I only mentioned to my brother *Henry* the advice given me by Mr. *McCann*."

Statement.

The other facts in the case appear sufficiently in the judgment.

At the hearing a decree was made in favour of the plaintiff. His Lordship the Chancellor, before whom the cause was heard, after briefly stating the facts above set forth, observing, "It is sought to fasten upon the defendant a knowledge or notice of the plaintiff's claim at the time he purchased; but this, I think, is not made out: the only evidence of it is that obtained by the examination of the defendant himself; and the most that can be obtained from him is, that years ago, when he was quite a youth, he heard rumors in the neighbourhood that the widow of *Thomas* had sold to *Edmund Harvey*: but he swears that he never heard that the plaintiff claimed or had any interest in the land until

versation with him, had said that his (the witness') "brother would yet put me off the place, and that I might as well let him have his rights in the land; that he would not trouble me if his uncle *Henry* did not, but that if the latter did he would push too."

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after the sale and deed to himself; that *Edmund* having had the patent for some years, and having been so many years in possession of the land, he assumed that a title derived from him was good; and in this assumption I think he was justified as against mere vague reports which he had heard years ago—to which he was under no necessity to pay any attention—which did not come from any one interested in the property—which may have been nothing more than the gossip of the neighbours, and which it is not shewn here or from any circumstance in evidence must have been present to his mind when he made the purchase. But it is claimed that, nevertheless, the plaintiff can enforce his equity, inasmuch as the whole of the purchase money has not been paid by the defendant; and this, as to £75 of it, I, after some doubt, find to be the case. That sum of £75 is represented by the note of the defendant's father, which the defendant swears was taken by *Henry Harvey* in lieu of his, the defendant's own note, and instead of a mortgage, for the convenience of all parties, as the father was considered good for the amount, and near to or on the spot to make the payment when it fell due, whereas the defendant was frequently absent from home on his business; and it was arranged that the father was to provide money to pay this his note, or to recoup himself for it, if paid with his own funds, out of moneys which he was to collect upon certain promissory notes belonging to the defendant, and left in his hands for collection. This note of £75 is still unpaid and in the possession of the executors of *Henry*, now dead. Whether it was or not a negotiable instrument does not appear. But however that may be, it is unpaid, and has never been transferred; and as it was to be paid in reality with the defendant's own money, and the defendant has it in his power to prevent its being paid, in order that he may not be called upon to re-pay his father in case he pays, or that his own funds in his father's hands may not be appropriated to the purpose, I think I must treat so much of the pur-

chase money as it represents as still outstanding and under the control of the defendant; and that this being so the plaintiff's equity is let in, and entitles him to a decree restoring him the land of his ancestor. It may be a very harsh equity to administer when, as here, the greater portion of the purchase money has been paid. But the rule is too well settled as a doctrine of equity for me to attempt to shake it, and my duty is to apply it when the facts admit of it. Here the defendant, shortly after his purchase, received direct notice from the plaintiff of his claim, and of his intention to prosecute it; and it is not alleged, and is most probably not the fact, that any improvements had been made by him on the premises. It does not appear what improvement may have been made by *Edmund Harvey*; nothing was said about any allowance for them, or whether it was sought to apply to this case the decision in *Bevis* v. *Boulton*. (*a*) If it is desired to raise any question on this head it can be spoken to before me on settling the minutes of the decree.

I think the plaintiff should not have costs. It is true that he only came of age a year or two before the sale to the defendant; but long before he came of age he was aware of his rights, although he may not have had possession of the evidence with which to support them. With this knowledge he allows his uncle *Edmund* to remain in possession as apparent owner, telling him he would not disturb him, but that if his uncle *Henry* interfered he would then wage war. *Henry* did interfere, and got the property and ejected his brother, and this after the plaintiff came of age. But still the plaintiff does nothing until after the defendant, six months later, had made his purchase. I cannot say that this want of action on the part of the plaintiff disentitles him to relief; but it has led the defendant into the difficulty; for had the plaintiff been more active the defendant would have known of his claim and not have purchased. An infant of an age and of intelligence

(*a*) 7 Gr. Ch. R. 39.

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sufficient to understand his own rights, is not allowed any more than an adult designedly to mislead another;* and though there was no design here to mislead the defendant, yet he suffers from the plaintiff having been very inactive; and I think the plaintiff must share so much of the consequences as to bear his own costs.

From the decree drawn up on this judgment the defendant *Smith* appealed.

Mr. *A. Crooks*, Q. C., for the appeal, contended that the decree so pronounced should be reversed on the grounds that the defence set up by the defendant in the court below was duly proved by the evidence taken in the cause, he being shewn to have been a *bona fide* purchaser for value without notice of the equity set up by the bill; that he is fully protected by his legal title against the alleged equity of the plaintiff, which equity, however, the plaintiff had failed to establish by evi-

Argument.

dence in the cause; and that the proceedings to set aside the patent referred to should have been by and at the instance of her Majesty's Attorney-General.

The plaintiff comes into court claiming that, upon the footing of an agreement, *Edmund Harvey* was a trustee, which it must be inferred the plaintiff adopts; he also founds a claim for relief on the ground that the grant from the Crown had been issued through improvidence and mistake. The defendant contends that *Henry Harvey* was a purchaser for value without notice. His lordship the Chancellor assumed notice, but that it is submitted was not proved. True, *Edmund Harvey* says, that he told his brother *Henry* all the circumstances attending his obtaining the patent, but his evidence must be received with extreme caution under the circumstances. Now, notice to be of any avail must be distinct and unambiguous. *Rice* v. *Rice*, (*a*) *Barnhart* v. *Greenshields*. (*b*)

(*a*) 2 Drew 73. (*b*) 9 Moore, P. C. 18.

* See also on this point Leary v. Rose, 10 Gr. Ch. R. 346.

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But admitting for the sake of argument that *Henry Harvey* had notice, it is apparent that the defendant had not any actual notice. The decree is founded therefore on the fact that the defendant has not paid all his purchase money; this he submitted was an erroneous view, for the evidence of the elder *Smith* establishes the fact of all having been paid. On this point the witness says, "the defendant, my son, bought the lot from *Henry Harvey* for £375; of which £100 was paid in cash at the execution of the deed. I gave my own notes for £175, part of which I owed my son, who, for the residue, gave me notes he had of other parties; the balance, £100, was retained till the title was examined in the registry office. *Henry Harvey* was offered a mortgage, but he preferred my notes. It was no part of the bargain that *Henry* was to hold the land in security—nothing was said about such security one way or the other;" this, it is contended, was a complete payment so far as the defendant and his vendor were concerned. Under these circumstances it is impossible for plaintiff to insist that any lien could exist for unpaid purchase money, the vendor having accepted the note of a third party in preference to taking a mortgage on the estate, which was offered to, and rejected by, him. *Belshaw* v. *Bush*, (*a*) *Smith* v. *Mundy*, (*b*) *Thorne* v. *Smith*, (*c*) *Frail* v. *Ellis*. (*d*)

Argument.

The note having been taken in payment of the balance remaining due, was in fact substituted for such lien, which the vendor might otherwise have had, and the purchaser was discharged from all liability; and if so, it is difficult to see how the land could remain liable to any extent. He also referred to, and commented on, *Mackreth* v. *Symmons*, (*e*) *Moloney* v. *Kernan*, (*f*) *Carter* v. *Carter*, (*g*) *Colyer* v. *Finch*. (*h*)

Mr. *Blake* and Mr. *Wells* contra, contended that the

(*a*) 11 C. B. 191.
(*b*) 6 Jur. N. S. 977.
(*c*) 10 Ib. 659.
(*d*) 16 Beav. 350.
(*e*) 1 Wh. & Tud. 235, 251, 262.
(*f*) 2 D. & W. 31.
(*g*) 3 K. & J. 617.
(*h*) 5 H. L. Ca. 905.

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facts alleged and established by the plaintiff entitled him to the relief given by the decree appealed from, the defendant not having sufficiently set up the defence of a *bona fide* purchaser for value without notice, and that defendant has not shewn himself entitled to set up such defence within the meaning of the rules in that behalf; nor is he entitled to the protection afforded to such a purchaser.

The arrangement was never adopted by the plaintiff to any extent. On the application by *Edmund Harvey* for the patent to issue to him, it was not the case of conflicting claims for the same property; but *Edmund* represented himself to the department as being the assignee of *Vigner*, the original vendee of the Crown; this the evidence distinctly proves he was not, and therefore it was correct for the plaintiff to allege that the patent had been issued through improvidence and mistake on the part of the Crown: indeed, the plaintiff is prepared to assume a higher ground for setting aside this grant; the evidence of *Edmund* himself affording ample proof that he had obtained the same by fraud and misrepresentation. *Phillips* v. *Phillips*. (*a*)

Argument.

Counsel also contended that the defence of purchase for value without notice was not sufficiently set up by the answer; and the defendant's own explanation of the transaction, when examined in the cause, does not establish it; and his evidence, such as it was, was not given in such a manner as to impress any one favourably as to its correctness. The effect of the whole transaction was, that *Smith* the elder was simply a surety for his son, and it is incorrect therefore to treat this as a case where the note of a third party was taken as and for payment of the land. The reason assigned why the father's note was given was for the convenience of payment, as the defendant would probably be absent at the time it fell due. Had a mortgage been given *Henderson* v. *Graves* (*b*) shews the right of the plaintiff would

(*a*) 7 Jur. N. S. 1094, S. C., 8 Jur. N. S. 145.
(*b*) Ante page 9.

have been irresistible. Now, the same witness who proves the taking of the notes also establishes that, but for the expense, a mortgage would have been created in favour of the vendor *Henry Harvey*, besides which the notes themselves were to be retired by the father out of the proceeds of notes left by the son for collection. In fact, they were to be paid with the moneys of the defendant.

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Tildesley v. *Lodge*, (*a*) *Grant* v. *Mills*, (*b*) *Ogilvie* v. *Jefferson*, (*c*) *Ford* v. *White*, (*d*) were also referred to.

DRAPER, C. J.—The plaintiff's case is, that in 1839, his father acquired by purchase and assignment the right of one *Vigner*, who had a contract for the purchase from the Crown of the east-half of No. 5, 3rd concession of East Hawkesbury, at 12s. 6d. per acre, payable in ten annual instalments, of which *Vigner* had paid the first of $25.

Judgment.

The plaintiff's father died intestate, in 1839 or 1840, the plaintiff being then about six months old.

Plaintiff's mother, within about a year from her husband's death, gave up possession of the premises to *Edmund Harvey*, an uncle of the plaintiff, together with the papers relative thereto. Some years after her death, (for she only survived her husband sixteen months,) *Edmund Harvey* got *Vigner*, the original purchaser from the Crown, to make a new assignment directly to himself, and upon this assignment a patent from the Crown, dated 20th February, 1856, issued, granting the premises in fee to *Edmund Harvey*.

On the 15th September, 1859, *Edmund Harvey* mortgaged the premises in fee to his brother *Henry*, and afterwards released to him the equity of redemption,

(*a*) 3 Jur. N. S. 1000, S. C., 5 S. & G. 543. (*b*) 2 V. & B. 306.
(*c*) 8 W. R. 745. (*d*) 16 Beav. 120.

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and the plaintiff charges that *Henry Harvey* had express notice of all the facts at and before the execution of each of these deeds.

The defendant purchased, and, as the bill states, before the plaintiff became of age, from *Henry Harvey*, and it is charged that before the payment of the consideration the defendant had full notice and knowledge of the facts and of the plaintiff's rights.

It appears the consideration for the purchase was £375, of which £100 was paid down in money, £175 by notes given to *Henry Harvey* by defendant's father, to which notes defendant was no party, and the remaining £100 was paid as soon as a search had been made at the registry office, by which it appeared that the title was in *Henry Harvey*.

Judgment.

I believe there is no difference of opinion in the court upon the matter of law. There are two questions of fact to be established, failing either of which the decree cannot be upheld. 1st. Notice of the plaintiff's rights to *Henry*. 2nd. That there was part of the purchase money remaining due by the defendant to *Henry Harvey* on the conveyance of the land by the latter to defendant.

As to the first, *Edmund Harvey* is the only witness, for his vendee *Henry* is dead, and he admits that he wished to have kept this lot, as he said he could have paid off his mortgage to *Henry* if more time had been allowed him, and he insinuates that he executed the release or conveyance of the equity of redemption in ignorance of its contents. He refers, however, to *Henry's* refusal to wait on him, and adds, "this refusal is the cause of all the trouble here to day. Had he agreed to give me time this suit would not have been brought. I could have settled with my nephew. A year before my brother and myself quarrelled my nephew, the plaintiff, told me he would put me off the place, but he

said *Henry* was pressing me hard and would yet have it: my nephew used to tease me about it before this, saying he would give me a hack about it some day or other. I never then incensed him into it. I was angry at being turned out of the place. I did not think I had had fair play." He then adds, that he told *Henry* long before the mortgage of the mode in which he proposed to get the patent to himself, that is, how he had been advised in the matter. And he said that at the time he borrowed the money from *Henry* he was not sure he had a good title to the land, but he did not know what *Henry* thought of the title.

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I cannot say that this evidence is to my mind satisfactory or convincing. When notice to *Henry* is a material link in the proof which is to let in the plaintiff's equity, it ought to be very clearly established, for notice to the defendant himself certainly is not proved, and he is on the evidence a *bonâ fide* purchaser for value.

Judgment.

Then as to the second question. The learned Chancellor has, as I gather, decided in favour of the plaintiff, if not with hesitation, at least with some reluctance. The following passage from his judgment appears to indicate such a feeling: "It may be a very harsh equity to administer, when as here the greater portion of the purchase money has been paid. But the rule has been too well settled as a doctrine of equity for me to attempt to shake it, and my duty is to apply it when the facts admit of it."

Even on the first question, I should have more readily concurred in a conclusion that notice to *Henry* was not sufficiently proved, and it is rather from a strong sense of the inconvenient consequences that might ensue from sustaining an appeal on a question of the sufficiency of proof where there is proof, than any other reason, that induces me not to give way to the scruples that I feel

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in acting on the testimony of *Edmund Harvey* as to notice to *Henry*.

But on the other question of fact, I am compelled to say that I think the evidence insufficient to support the plaintiff's contention.

The account of the transaction given by the defendant's father is, that the defendant bought from *Henry Harvey* for £375, of which the defendant paid £200 in money, and the father gave his own promissory notes to *Henry Harvey* for the remaining £175: that *Henry* preferred to take these notes to taking a mortgage on the land, which was offered to him, and that only £75 remains unpaid on those notes given by the father.

Judgment.

The defendant, who was examined as a witness by the plaintiff, stated it thus: "My father was to pay the £75 over the £100, for which he gave his notes, out of moneys he would collect from notes outstanding payable to me: he gave his notes, as I would be from home when the payments would fall due: £75 has been paid on my father's notes, I think in February, 1862: the balance remains unpaid. My father proposed to *Henry Harvey* to give his own notes for £75: *Henry* said he would accept them, as he thought they were good for the money. It was said my father would be at home when the payments to be covered by the notes would fall due, and that I, likely, would not be, and that it would be better to give his notes."

The father, in explaining why he gave notes for £175, stated, that he owed the defendant part of it, and for the residue the defendant gave him notes of other parties: that there was at the time of the purchase about £100 of the defendant's money in his, the father's hands. The defendant on this point stated that he thought his father was owing him £100 in money; "he owed me only the £100 in money that he had used." The

defendant also said that he never claimed wages from his father, though the latter had said he would allow them to him. 1864. Harvey v. Smith.

It seems, therefore, clearly admitted that £75 is still to be paid to *Henry Harvey's* personal representatives, but it does not necessarily follow that the defendant owes that sum. *Henry Harvey* might have accepted, as payment for his land, chattels or *choses in action*, as well as moneys numbered. There is nothing whatever to shew that the defendant is in any way a party to the notes given by his father, and it is in evidence that the vendor *Henry* elected to take these notes, rather than to take a mortgage, and one witness "understood that the old man gave his notes, as he was indebted to his son, and it was thought to be cheaper to take them than a mortgage." The learned Chancellor, as I understand his judgment, deduces the conclusion that this sum of £75 remains due by the defendant *quâ* purchase money of the land: that *Henry Harvey* had therefore a lien for so much of the purchase money, and consequently that the plaintiff's equity against *Henry* as a purchaser having notice is let in. The opposite view is, that the notes in question were taken by *Henry Harvey* in substitution for the unpaid purchase money, or were themselves a part of the consideration contracted to be given by the defendant, and were so accepted by *Henry Harvey* in payment for the land. Judgment.

If the evidence upholds this view, and shews that the vendor meant to rely on the notes alone, then though the agreement was merely by parol, yet it puts an end to the lien, as I understand the doctrine of equity. I think this conclusion may fairly be deduced from the proof that *Henry Harvey* elected to take the father's notes in preference to a mortgage. And then surely it would be a strange thing to hold that a man who expressly waives a legal security on the land for a part of the purchase money, shall nevertheless be presumed to have intended to retain an equitable lien for it.

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In my opinion the evidence warrants the court in holding that as between *Henry Harvey* and the defendant there was no unpaid purchase money, and consequently the plaintiff's bill should be dismissed with costs.

VANKOUGHNET, C.—My judgment in the court below did not at all proceed upon the ground that there was any existing lien for a balance of purchase money unpaid. It was unnecessary to consider that. I held that the whole of the purchase money had not been paid, inasmuch as the appellant, on receiving notice of the respondent's equity, was entitled to require from the vendor a delivery up of the note which his father had given for his accommodation, because he was bound to re-pay his father what the latter should pay upon it; and having this right, it was his duty to insist upon it, and if necessary to file a bill in this court to enforce it. If after knowledge of the plaintiff's equity, he, without remonstrance or action, allowed his father to pay the note, he would have permitted a payment in his own wrong, and could not afterwards be heard to say that he was a purchaser for valuable consideration *fully paid.* He was bound to submit to the plaintiff's equity when he became aware of it, and to protect himself against the vendor, if he chose. If he did not so choose, the blame and the loss should fall on him. I think the opinion I expressed in the court below is in accordance with the rule of decision in England, which the statute law of the province and my judicial oath compel me to observe, and I cannot conscientiously concur in any other view, though the conclusion at which the court has arrived may probably be the more just one as between the parties.

Judgment.

RICHARDS, C. J.—I fully concur in the views which have been expressed by his lordship the Chief Justice. No case has been cited where the note of a third person has been accepted by the vendor, and the lien for the unpaid purchase money held still to remain; and cer-

tainly with the protection which our registry laws were intended to afford to purchasers, I do not feel inclined to carry the doctrine further than decided cases compel us to do. On the whole, I think the appeal should be allowed, and the bill in the court below dismissed with costs.

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SPRAGGE, V. C.—I am unable to concur in the judgment of the majority of the court.

I take it to be settled by the judgment of this court in *Graves* v. *Smith*, (*a*) and to be clear law upon English decisions, that a defendant in this court cannot protect himself, from a plaintiff's equity, as a purchaser for value without notice, if any portion of the purchase money remain unpaid at the time of bill filed, or notice given.

In this case it is clear upon the evidence that a portion of the purchase money has not been actually paid, and the judgment protecting *Smith* as a purchaser is rested upon this, that as between him and his vendor *Henry Harvey* there was no lien for unpaid purchase money, because the note of a third person, the purchaser's father, was given to the vendor for the amount. Judgment.

The nature of this equity—lien for unpaid purchase money—is familiar; Lord *St. Leonards* says of it, "It is immaterial that the seller had no intention to reserve such a lien, or even intended to rest satisfied with the personal security: in either case the lien will be raised in his favour, if the security which he has accepted does not from the nature of it preclude the claim." And it has been well observed by the learned reporter in Bankruptcy Mr *Rose*, (*b*) that no general conclusion can be drawn from the nature of the security alone; that the conclusion of abandoned lien must still depend on the particular circumstances of the case.

I believe it is a point still undecided, whether in the

(*a*) Ante p. 9. (*b*) 2 Rose Ca. in Bky. 81 n.

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case of a note being given by a third person for the unpaid purchase money the lien is gone. In this case the circumstances under which the note was given should be looked at. The note was for £175. Of this, £100 was due by the giver of the note to the purchaser; or, in other words, the purchaser had £100 in the hands of the giver of the note. There were also in the hands of the latter notes of third persons due to the purchaser, sufficient, as it was estimated, to answer the balance of £75, and which it was expected he would receive before the note which he had given would fall due; and the reason of this note being given by the purchaser's father, instead of by himself, was, that the purchaser expected to be absent, while his father would be on the spot, when the purchase money would fall due. Now the real nature of this transaction was simply this: the father having in his hands moneys of the purchaser, and securities for further moneys, which he expected to realize, undertook to apply these moneys at a future day in the payment of the balance of purchase money, and became responsible to the vendor for the amount, at the request of the purchaser. If this request had been written, and the promise to pay, upon the paper containing such request, it would have been a bill of exchange, accepted by *Smith* the father, and so within the case of *Grant* v. *Mills*, before Sir *William Grant*. In that case a bill was drawn by the purchaser and accepted by the firm in which he was a partner; and Sir *William Grant* was clearly of opinion that there was no waiver of the lien by taking the bill. He observed, "The only question is, whether the plaintiff has parted with that lien, which, unless it has been parted with, every vendor has for the price of his estate. It is said, that by taking bills, accepted by the partnership in which the purchaser was a partner, the vendor has got the security of a third person, viz., the other partner, which must be considered as a substitution for the lien. What may be the effect of a security, properly

Judgment.

so denominated, of a third person, has never, I believe, been absolutely determined: but I perfectly concur in the opinion expressed by Lord *Redesdale*, in *Hughes* v. *Kearney*, that bills of exchange are to be considered, not as a security, but merely as a mode of payment. That is obvious from attending to the nature of a bill of exchange. It is an order by the drawer for the payment of money, which he has in the hands of the drawee, to the holder of that bill. The acceptor by his acceptance acknowledges that he has money belonging to the drawer in his hands, and engages to have that money forthcoming according to the requisition of the bill. The acceptor is never considered as a surety for the debt of another: by accepting he admits himself to be debtor to the drawer. The subject of the bill is in contemplation of law the drawer's own money, which he authorises the creditor to receive instead of receiving it himself, and afterwards handing it over to such creditor. My opinion is clearly, that there is no waiver of the lien by taking bills; and therefore the plaintiff is entitled to whatever part of the purchase money remains in the hands of *Mills*.

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Judgment.

Looking at what was really the nature of the transaction in this case, I cannot see any waiver of lien, any more than in *Grant* v. *Mills*; the circumstances are indeed substantially the same. Suppose the father had been indebted to the son to the full amount of the unpaid purchase money, and had at the request of the son given his note, the case would be plainer, but as it is, it is the same in principle as in the case of the acceptance of a bill; the party undertaking to pay did so because he had moneys in his hands for the greater portion of the amount, and the means of realizing the balance, and for that reason and in that character undertook to pay, and not as a mere surety for the purchaser.

But further, I am not prepared to concede that the

(*a*) 1 S. & Lef. 132.

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protection accorded by a court of equity to a purchaser for value without notice rests upon the same principle as lien for purchase money. Lord *St. Leonards*, in treating of a plea by such purchaser, says, (*a*) "The plea must also distinctly aver that the consideration money mentioned in the deed was *bona fide* and truly paid independently of the recital of the purchase deed, for if the money be not paid the plea will be overruled," and gives this as the reason "*as the purchaser is entitled to relief against payment of it.*" For this *Hardingham* v. *Nicholls* (*b*) is cited, where the plea was, purchase for a valuable consideration, and that the purchase money was paid *or is bona fide secured to be paid.* Lord *Hardwicke* overruled the plea, observing, "The defendant has not paid the money yet; and therefore, as he has notice now of the plaintiff's title, the money he has only secured to be paid may never be paid."

Judgment.

For what reason is it that the purchaser is entitled to relief against payment of the purchase money? For this reason only I conceive, that the equitable title is in another than his vendor; and it is inequitable that his vendor should exact payment of his purchase money when he cannot make title for the land sold. And this reason is quite independent of lien or no lien for the unpaid purchase money, and is just as sound and forcible when there is no lien as when there is. For the court to say, true it is, the vendor cannot make a good title, and the general rule in equity is, that in that case the purchaser shall be relieved from the payment of purchase money, but here the vendor has no lien, and therefore the purchaser must pay, seems to me, I confess, an illogical conclusion.

I take it to be proved in this case that the equitable title is in the plaintiff, and I think that *that* coming to the knowledge of the purchaser *Smith*, while there was purchase money unpaid, was a ground to excuse him

(*a*) 14th Ed. 789. (*b*) 3 Atk. 304.

from further payment, and for relief in a court of equity; and if so, he cannot be a purchaser for value without notice. The facts do not exist which enable him to plead the necessary defence. 1864. Harvey v. Smith.

I cannot conceive that the circumstance of the purchaser's father having undertaken to pay, that undertaking being in effect to apply the purchaser's moneys in his hands to the payment of the unpaid purchase money, can make any difference. I certainly should not hesitate to apply the equitable rule in such a case against the vendor. If he ought not to be allowed to compel the purchaser to pay directly, he ought not to be allowed to compel the application of the purchaser's moneys. I should consider that point too clear for argument.

To recur for a moment to the point of lien. If in the case of a vendor retaining a lien for unpaid purchase money, but unable to make title, his purchaser is relieved from its payment, can it be that because he does not retain a lien he shall, while unable to make title, compel payment. Such a distinction appears to me, I confess, unintelligible, and I venture to think is not founded in reason or upon authority. For these reasons I am obliged, with deference to the majority of the court, to dissent from the conclusion at which they have arrived. Judgment.

Per Curiam.—Appeal allowed, and bill in court below dismissed with c[illegible]s. [*Vankoughnet*, C., and *Spragge*, V. C., dissenting.]

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ON AN APPEAL FROM THE COURT OF CHANCERY.

THE BANK OF UPPER CANADA v. THOMAS.

Judgment creditor—Form of decree setting aside deed for fraud—Dower of wife of grantor.

In setting aside a deed for fraud, at the instance of a judgment creditor, by a decree of this court, the proper form is to avoid the deed only as against the parties injured by the conveyance, and direct a sale of the property; the court will not simply set aside the deed and allow the judgment creditor to proceed and enforce his claim at law: and where the wife of the grantor joins in such a deed to bar her dower, it should be avoided only so far as it passes the estate and interest of the grantor: the creditor not being entitled to the benefit of such release of dower. In such a case what is properly the effect following from the release of dower, and to whose benefit it will ennure?—*Quære.*

Where a debtor conveyed away his estate, in fraud of creditors, to a person having a judgment against the debtor, which conveyance was declared fraudulent and void as against creditors, upon a bill filed at the instance of certain of the creditors: *held*, in this respect varying the decree of the court below, that the creditor, to whom the conveyance had been made, was not, under the circumstances, precluded from enforcing his judgment against the lands of the debtor, the conveyance of which had been so avoided.—[VANKOUGHNET, C., *dissenting.*]

Statement.

The facts upon which the decree appealed from was founded, sufficiently appear in the report of the case in the court below. (*a*) The decree drawn up on the judgment there reported declared the deeds from *Thomas* to *Stephens* "*fraudulent and void so far as they pass the estate and interest of the said George Thomas, as against the plaintiffs as creditors of the said George Thomas, and against the other creditors of the said George Thomas, except the defendants Beatty* and *Stephens.*" Also that the conveyances from *Stephens* to *Beatty* were void as against the plaintiffs, and others, the creditors of *Thomas;* directed the usual reference to the master at Chatham to enquire as to incumbrances, take an account of the amounts due—ordered payment within one month after report, or in default a sale. The decree also declared *Beatty* estopped from setting up any claim on the judgment recovered by him against *Thomas,* and ordered him to be restrained by injunction

from setting up any claim under or in respect of such judgment.

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From this decree the plaintiffs appealed on the following, amongst other grounds, that the decree ought to have merely set aside the fraudulent and void deeds, and have allowed the plaintiffs to sell at law, and ought not to have compelled the plaintiffs to sell under the decree of the court of Chancery; that it ought to be, and is optional with the plaintiffs either to sell at law or in that court; that the decree ought to have declared that the dower of the wife of the defendant *Thomas*, was extinguished by the conveyances from the defendant *Thomas* to the defendant *Stephens*, and the lands ought to have been directed to be sold free from such dower, and it ought to have been declared that neither the defendant *Beatty*, nor any other person is entitled to such dower, and that in fact such dower, or right to dower, does not exist; and that in any event the decree ought not to have directed merely the sale of the interest of the defendant *Thomas* in the lands, but ought to have ordered the sale of the lands, leaving the question to any right of dower undecided, and the decree ought not to have proceeded on the assumption that any dower or right of dower does exist.

Statement.

Against this appeal the defendant, *Beatty*, contended that the decree was not erroneous in the matters in respect of which the plaintiffs appealed on the following, amongst other grounds: that under the prayer of the plaintiffs' bill, and according to the course of the court, it was proper for the court to direct the sale to take place in the cause; that the minutes of decree were brought in by the plaintiffs, directing the sale so to take place; and the plaintiffs approved and assented to such minutes, in that particular; and it was not until after the same were settled with such approval and assent, in that particular, that the plaintiffs objected to the same; that if the said decree had merely set aside the

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deeds in question, and the plaintiffs had been left to a sale at law, such sale would not have passed the right of dower of the wife of the defendant *Thomas*, and therefore the plaintiffs, who contend that the sale ought to have taken place at law, cannot also contend for the non-existence of such right of dower; that upon the avoidance of the said deeds, the said right of dower either remained vested in *Beatty*, or reverted to the wife of *Thomas*, and the same did not become extinguished; that the question of the extinguishment of the said right of dower is not properly raised in the said bill, that that question cannot be raised in the absence of the wife of *Thomas*, and she is a necessary party to any suit raising the same, and that, according to the course of the court, the mode of sale prescribed by the decree is correct.

Statement.

The defendant, *Beatty*, also appealed from so much of the decree in the cause as is in the words following, that is to say:—"And this court doth further declare that the defendant, *James Beatty*, is estopped from setting up any claim on the judgment recovered by him against the defendant *George Thomas*, in the pleadings mentioned, as any lien or charge upon the lands and mortgages in the said bill mentioned, by virtue of the registration thereof, or writs of execution, or otherwise; and doth order and decree that the said *Beatty* be restrained from setting up any claim under or in respect of such judgment, or the registration thereof, or the writs thereon issued, or to be issued, or any lien or charge therefor on any of the lands or mortgages aforesaid, and from proceeding upon the said lands or mortgages, or any of them, or any part thereof, to realize his said debt, and that an injunction do issue for that purpose," as the same was erroneous, and should be reversed; and that so much of the bill in the cause as prays relief in respect of his judgment should be dismissed with costs on the following, amongst other grounds, that the right of the appellant to enforce his said judgment was discussed and settled in the other

suits in the pleadings mentioned, and should not have been interfered with in this suit; that the said right should have been discussed and settled in the said other suits, or in some proceedings to be taken, and which might and should have been taken in the said other suits, and not by an original bill such as the present; that the decree made in the premises is inconsistent with, and is in effect a reversal, variation or modification of the said other suits which still stand unimpeached; that the plaintiffs cannot avoid the conveyances to the appellant, and so obtain priority over the appellant's claims as grantee thereunder, and at the same time assert the validity and existence of the said conveyances, and so obtain priority over the appellant's claims as judgment creditor; and because the said decree is inconsistent with itself; that upon the true construction of the agreements and dealings of the parties the appellant was never estopped as between himself and *Thomas* from satisfying his judgment out of the lands in the pleadings mentioned, but, on the contrary, was always entitled so to satisfy the same; and because the plaintiffs cannot at any rate claim any greater rights than those of *Thomas* in the premises; and that even if the appellant was so estopped, as aganst *Thomas*, yet the plaintiffs are not entitled to assert any such claim.

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Statement.

The plaintiffs, with the defendants *Proudfoot*, *Henderson*, and *Robinson*, contended that the decree, in the respects appealed from by *Beatty*, was correct on the following, amongst other grounds, that the right of *Beatty* in respect of the said matter of appeal therein was not discussed or settled in the said other suits in the pleadings mentioned, nor could the same have been discussed or settled in such other suits, nor ought the same to have been settled in the said other suits; and because the plaintiffs were not, until the filing of their bill in the premises, aware of the circumstances under which the said other parties entered into the agreement in question, nor the particulars of such

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agreement; that *Beatty* did not, in the suit in the court below, prove the proceedings in the said other suits, so as to be able to use the same; and they submitted that the said other decrees cannot be used or referred to on this appeal; that the decree made in the premises is not inconsistent with nor is it in effect a reversal, variation or modification of the decrees in the said other suits, having regard to the pleadings, and the circumstances under which the said other decrees were made; that the conveyances in the bill mentioned being good and binding between the parties thereto, they were entitled to take advantage of any benefit which such conveyances (binding between the parties thereto) give to the said respondents, and that, although such conveyances are, as they are declared to be, fraudulent and void as against the respondents, as creditors of *Thomas*, and there is not, therefore, any inconsistency in the said decree; that upon the true construction of the agreements and dealings of the parties, the said *Beatty* was and is estopped in manner in the said decree declared, and the respondents being creditors, and not having been parties to the said transactions between the said *Thomas*, *Stephens*, and *Beatty*, are entitled to greater rights than the said *Thomas;* that upon the true construction of the said agreement and dealings, the said *Beatty* abandoned his said judgment, and substituted therefor other considerations referred to in the said agreements and dealings; that the judgment of *Beatty* became merged as against the lands and mortgages in question, and on this ground also he was estopped from setting up the same as against the said lands and mortgages; and that there is no reason in law or equity why the rights of the respondents should be limited to or measured by those of the said *Thomas*.

Statement.

Mr. *Fitzgerald* and Mr. *D. G. Boulton* for the Bank of Upper Canada.

Mr. *Blake* and Mr. *Wells* for *Beatty*.

Dolin v. *Coltman*, (*a*) *Ex p. Harvey in re Emery*, (*b*) *Stokoe* v. *Cowan*, (*c*) *Hatch* v. *Skelton*, (*d*) *Davis* v. *Barrett*, (*e*) *Byam* v. *Sutton*, (*f*) *Grice* v. *Shaw*, (*g*) *Watts* v. *Symes*, (*h*) *Squire* v. *Ford*, (*i*) *The Methodist Episcopal Church* v. *Jacques*, (*j*) *The Attorney-General* v. *Carr*, (*k*) *Buckley* v. *Wilson*, (*l*) were referred to by counsel.

At the conclusion of the argument the court intimated a clear opinion that the appeal of the plaintiffs, so far as it sought a variation of the decree directing a sale of the property, must be dismissed with costs. After taking time to look into the other grounds of appeal by the plaintiffs, and the appeal by *Beatty*.

Judgment.

DRAPER, C. J.—There are two appeals in this cause. One on the part of the plaintiffs, the other on the part of the defendant *Beatty*.

As to the first, the plaintiffs appeal because the decree avoids the deeds made by the defendant *Thomas* to the defendant *Stephens*, only so far as they pass the estate and interest of *Thomas*, whereas they insist that the deeds should have been declared wholly void.

The object of their contention is simply this, that as the wife of the defendant *Thomas* joined in these deeds to *Stephens* for the purpose of releasing her dower to him and those who might thereafter acquire the estate under him, her release (though she is no party to this suit) should in effect be declared to enure to the benefit of the plaintiffs as creditors of her husband, inasmuch as his conveyance of the lands has, for the benefit of the plaintiffs, been adjudged fraudulent and void.

(*a*) 1 Ver. 294.
(*b*) 3 Dea. 547. S.C. 4 Dea. 52.
(*c*) 29 Beav. 637.
(*d*) 20 Beav. 453.
(*e*) 14 Beav. 542.
(*f*) 19 Beav. 556.
(*g*) 10 Hare, 76.
(*h*) 1 D. M. & G. 240.
(*i*) 9 Hare, 47.
(*j*) 1 John. Ch. Ca. 66.
(*k*) 2 Beav. 420.
(*l*) 8 Grant, 566.

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We do not agree in this proposition. The effect of the decree is not wholly to avoid these deeds, for as between grantor and grantee it has not been denied that they are effectual to transfer the estate. All that has been urged against them, and all that the court have decided is, that they were made with the intent and design to defeat and delay the plaintiffs and other creditors of *Thomas*, and were therefore, as against such creditors, fraudulent and void. To this decision the defendants have submitted. But the plaintiffs desire to carry it further, and under it to obtain a right against the inchoate interest of *Thomas'* wife to dower in the lands conveyed, which interest their judgment did not reach or bind, nor did their execution attach upon it. What effect may properly follow this release of dower and to whose benefit it may enure, we are not now called upon to decide. But we have no doubt, that the plaintiffs having had originally no claim against the wife or her interest in these lands, have not acquired any by the husband's conveyances of his estate therein, and by the decree, that such conveyances have, as against creditors, been declared fraudulent and void.

Judgment.

This appeal must therefore be dismissed.

The other appeal comes from the defendant *Beatty*.

The facts material to be considered in relation to this seem to be the following:

He is a creditor of the defendant *Thomas* upon a judgment for $6000, entered against *Thomas* on the 12th of March, 1859, and duly registered, upon which writs against *Thomas'* lands were duly lodged with the proper sheriffs. This judgment, though charged by the plaintiffs' bill to be fraudulent, stands unimpeached by the decree.

He also holds by conveyance dated in November, 1860, from the defendant *Stephens*, those certain lands

which *Thomas*, by the indentures of the 13th April, 1860, conveyed in fee to *Stephens*.

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The Bank of Upper Canada hold by assignment a judgment against *Thomas*, which was registered the 16th November, 1858, on which executions against lands were lodged with the proper sheriffs in August 1861. They also hold a second judgment recovered by themselves against *Thomas*, and registered in April, 1860, and they hold a third judgment for a very large sum recovered by them against *Thomas* on the 6th June, 1862, on which, as well as on the second judgment, executions were lodged against *Thomas'* lands with the proper sheriffs.

The indentures made by *Thomas* to *Stephens* have by the decree been declared to be fraudulent and void, so far as they pass the estate and interest of *Thomas*. The appellant, *Beatty*, has therefore no recourse to those lands under his conveyance from *Stephens* until the bank judgments are satisfied, and to this extent the appellant, *Beatty*, submits.

Judgment.

But the decree further declares, that the defendant, *Beatty*, is estopped from setting up any claim on the judgment recovered by him against the defendant, *Thomas*, as any lien or charge upon the lands or mortgages in the bill mentioned by virtue of the registration thereof or of writs of execution or otherwise, and orders a writ of injunction to restrain him from making any such use of the judgment. Against this part of the decree the defendant, *Beatty*, appeals.

It has been urged on behalf of the bank that the judgment obtained by *Beatty* was merged in the inheritance acquired by him under the conveyance from *Stephens*, and therefore cannot be set up by him for the purpose of having execution against the lands of *Thomas*.

The decree is not rested on the ground of merger, so

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far from it that it treats the judgment as valid and existing. If the learned Chancellor had thought the judgment extinguished he would not have declared *Beatty* estopped from setting it up and claiming to have it satisfied.

I do not differ from the view taken of the judgment. I have seen no sufficient authority for holding it to be merged and much which tends to an opposite conclusion. In addition to the authorities cited at the bar, I refer to *Tyrwhitt* v. *Tyrwhitt*, (*a*) *Davis* v. *Jones*, (*b*) *Swinfen* v. *Swinfen*, (*c*) and *Brandon* v. *Brandon*. (*d*)

The decree is in express terms rested on the ground that the appellant is estopped by the taking of this deed under the circumstances from setting up any claim on the judgment. It in effect declares that the very conveyances which by the same decree are adjudged fraudulent as against *The Bank*, do nevertheless work an estoppel in their favour against the appellant, who, as between himself and *Thomas*, has become the owner of the lands, &c., mentioned therein.

Judgment.

As I understand the argument, it is, that the appellant was a party to deeds by which the lands of *Thomas* were conveyed to him: that such deeds were fraudulent and void as against the creditors of *Thomas*, though valid to pass the estate as between himself and *Thomas:* that the appellant therefore is estopped from asserting that these lands belong to *Thomas* and are liable to his, the appellant's, judgment and execution; and further, that he cannot be permitted to derive a benefit from the setting aside by the court of these deeds on the ground of fraud, to which he, the appellant, is a party.

It seems to me important to remember, that so far as we are informed, the appellant's judgment is a *bona fide* claim and charge against *Thomas*. *The Bank* charged

(*a*) 9 Jur. N. S. 346.
(*b*) 8 Jur. N. S. 592.
(*c*) 7 Jur. N. 89.
(*d*) 31 L. J. Chan. 47.

that it was otherwise, but failed to sustain their allegation. It was entered and registered long before this transaction of the conveyances of *Thomas'* lands; is entirely unconnected with it, and it is still unsatisfied: and apart from the question under discussion, it has priority over a very large portion of *The Bank's* demand. The effect then of the decree is not only to set aside conveyances which passed the estate to the appellant, and to subject the lands to be sold by execution, but further, to inflict a penalty on the appellant, by depriving him of the right to enforce his judgment in the legal priority in which it stood, and in effect, as is said, owing to the large amount due *The Bank* on all their judgments against *Thomas*, to deprive him of any prospect of getting paid out of the proceeds of *Thomas'* lands.

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Treating this as a question of legal priority, I have been unable to satisfy myself that the appellant has lost it, nor do I discern the equity on which *The Bank* relies for defeating the appellant's recovering satisfaction upon his judgment. He is not claiming anything which depends upon the fraudulent conveyances; but he urges that *The Bank* should not be allowed, on the one hand, to set aside these deeds in order to let in their execution, and, on the other, to assert their validity for the purpose of shutting his execution out. He claims that they, who not only are not parties or privies to the conveyances, but are acting in opposition to them, shall not be allowed to set them up by way of estoppel to his prejudice.

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No authority has been cited which supports the contention on the part of *The Bank;* and though neither *Dolin* v. *Coltman* nor *Stokoe* v. *Cowan* appear to me as precisely in favour of the appellant on the point in question, yet they tend that way with sufficient force, in the absence of anything to the contrary, to induce me to hold that the appeal should be allowed, and so much of the decree, as relates to the estoppel to making use of the judgment, should be reversed.

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VANKOUGHNET, C.—The question debated on the appeal in this case, though presented to me in the court below, was not much discussed there, nor were any authorities bearing upon it cited. After careful consideration of all that has been now urged, I am constrained to the conclusion that the opinion which I formed at the moment was correct, and that this appeal should be disallowed. It must be assumed that the decree was right in declaring that the deed under which the appellant claims was fraudulent and void, as against the respondents, the plaintiffs in the court below, and other such creditors as were in a position to prosecute their claims against the lands of the debtor, *Thomas*, by whom the fraudulent conveyance was executed. As between *Thomas* and the appellant, *Beatty*, the transaction is binding. *Beatty* cannot repudiate it on the ground of fraud, nor refuse to pay *Thomas* the purchase money of the land, because, by reason of the transaction between them; or between *Thomas* and *Stephens*, in whose place *Beatty* stands, being fraudulent, claims of creditors of *Thomas* have been let in, which may sweep away a portion or even the whole of the property. Now, when the court sets aside a deed as fraudulent against creditors, can any instance be found of one who has been a party to the fraudulent deed being ranked among the creditors who are entitled to the benefit of such a decree, as against the property which such party obtained and holds by fraud? Could such party himself set up the fraud and ask to have the deed on that account declared void, and if he could not do it himself, can he avail himself of the proceedings of others for the same purpose? Once a decree is made for the benefit of creditors, all creditors become or are entitled to become actors under it, and prosecute the decree. What then would be the effect of holding the judgment of *Beatty* against *Thomas*, as still a charge upon the land which the latter conveyed, and which *Beatty* up to the last step of this suit claimed, and indeed still claims as his own? Why, that *Beatty* himself could not file a bill to enforce his own judgment against this land,

Judgment.

which became absolutely his, as between him and *Thomas*, yet that, in the suit instituted by the respondents, he would be enabled to take up the decree and prosecute it if they neglected to do so, and sell his own land as *Thomas'* land still, though the law says it is his land as between him and *Thomas*, and the transaction, by which it became his is, as between the two, binding? Suppose *Beatty* directed the sheriff to sell this land under an execution against *Thomas*, and the sheriff declined and returned the writ, no lands, would an action therefor lie against him? Could not the sheriff shew the truth and prove that *Thomas* had conveyed these lands to *Beatty*, and that they had therefore ceased to be the lands of *Thomas?* *Beatty* could not re-vest these lands in *Thomas* by merely saying they were his. Again, suppose the sheriff had sold under the execution of the respondents these lands, would he have been justified in satisfying out of the proceeds the execution in his hands of *Beatty* against *Thomas* in priority to the plaintiffs' writ? I think not. I think that if, as between *Thomas* and *Beatty*, the lands had become *Beatty's*, the sheriff would not be justified as between them, and as against another creditor, in treating the land as still *Thomas'*. He certainly could not, in my opinion, be compelled by *Beatty* to do so; and I think any creditor who had been defrauded by the transaction, between *Beatty* and *Thomas*, would have a right to insist that, as between the latter two, it was binding. Equity in these cases gives no higher or other rights than the law does. Lord *Hardwicke* says in *Higgins* v. *The York Buildings Company*, (*a*) "I do not know, in the case of fraudulent conveyances, that this court have ever done any thing more than remove such fraudulent conveyances out of the way, * * * but equity follows the law, and leaves them to their remedy by *elegit*, without interfering one way or the other:" the rule being, as I understand Lord *Hardwicke*, and as I understand the law of the court to be, that no person affected by, concerned or interested in the remov-

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(*a*) 2 Atk. 107.

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ing out of the way of creditors a fraudulent conveyance, acquires thereby any higher or other right in this court than he held at law. This court may allow the parties to proceed upon their executions at law, as did Lord *Hardwicke* in the case cited; or according to the modern practice, it will itself sell the property, or procure money to be raised on or out of it to pay off the creditors; but in so dealing with the estate it never has, in any instance that I am aware of, created or acknowledged any other rights than those which the parties might have enforced at law; or interfered with the order of those rights, unless it be to enforce some equitable claim which this court would itself have directed against the land, had it remained in the hands of the fraudulent grantor. But it is said that the court removing the deed out of the way of creditors, will revive against the land the judgment of *Beatty*, and the well known doctrine of the court with regard to charges which have merged at law but have been revived in equity, is brought in aid of this position. What I have already said seems to me to answer this position. This court treats the fraudulent transaction as binding upon the parties to it, as does a court of law. There is no difference on this head in the law as administered in both jurisdictions, and, in dealing with this particular class of cases, equity but follows the law in settling the rights and claims of the parties before the court. But does the reason or the principle on which courts of equity have held that a charge does not merge, or on which they have given resurrection to a charge against a particular estate apply to this particular case? Is there any, the slightest reason to presume here that *Beatty* did not intend to hold this property absolutely as his own? Has he not up to the last moment—does he not now claim it as his own? and does not the law hold that, as between him and the grantor, the property has become his, and that he cannot repudiate the transaction, and must pay the full price agreed to be paid for it, even though it all be swept away to meet the demands of the defrauded creditor. Where that is the case, is there any presumption of a charge

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against such an estate in favour of the owner of it? In *Forbes* v. *Moffatt*, (a) Sir *William Grant* says, "In most instances, it is with reference to the party himself of no sort of use to have a charge on his own estate, and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot." I take this to be a true exposition of the law. If the intent of the party be clear that the charge shall go, go it will, however much it might have been to his interest afterwards to keep it alive. When a party acquires absolutely an estate, as *Beatty* did his, the presumption of law is that he intended the charge to go or merge, and that presumption can, as Sir *William Grant* says, be only prevented by some act of his keeping it alive. It cannot be rebutted, because, by reason of something done afterwards, it turns out that it would have been for his interest had he done some act to keep the charge subsisting. It seems to me, however, that this doctrine of merger has no application to the present case, and that it must be disposed of on other grounds indicated above. Something was said about the court doing equity, or compelling those who come into court to do equity. But that rule has never been invoked in favour of a person standing in the position of a fraudulent grantee. The particular form of the decree objected to seems to have been adopted rather for the purpose of raising, on appeal, the right of *Beatty* to have his judgment paid out of the lands than for any other. It was not settled by me, nor should I have thought it necessary or perhaps proper, because, in my judgment, the claim of *Beatty* at law against these lands was, upon his judgment, gone, and would have been so treated by the court on the distribution of the proceeds had *Beatty* made any claim upon them under the judgment.

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Per Curiam.—Appeal by *The Bank of Upper Canada* dismissed with costs. Appeal by defendant, *Beatty*,

(a) 18 Ves. 390.

1864. allowed, and decree of court below varied in so far as it restrains *Beatty* from enforcing his judgment against the lands conveyed by *Thomas* [VANKOUGHNET, C., dissenting.]

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ON APPEAL FROM THE COURT OF COMMON PLEAS.

SHIRIFF v. HOLCOMB.

Promissory note—Lower Canada Statute of Limitations—Action on note made, &c., in Lower Canada, against endorser, resident in Upper Canada.

An endorser of a promissory note, made, endorsed, and payable in Lower Canada, who was resident in Upper Canada, was sued there as such endorser, after a lapse of five years from the maturing of the note; the period prescribed as that within which an action must be instituted upon a note or bill of exchange in Lower Canada. *Held*, affirming the judgment of the court below that the plaintiff was not entitled to recover; the lapse of time under the statute operating as an extinguishment of the debt, without suit, not as a bar to the remedy only.

Statement. This was an appeal from the judgment of the court of Common Pleas, as reported in the 13th volume of the reports of that court, page 590, where the special case submitted to the court is fully set forth.

From that judgment the plaintiff appealed.

Mr. *A. Crooks*, Q. C., for the appellant, contended that he was entitled to judgment on the following, amongst other grounds; that the Statute of Limitations of Lower Canada, 12 Victoria, chapter 22, section 31, (C. S. L. C., ch. 64,) constitutes no bar to the recovery by the plaintiff, the Statute of Limitations of Upper Canada alone applying to the case, by which the right of the plaintiff is not barred; that any statute of limitations is properly an objection to the procedure only, and does not invalidate the contract itself; that the above mentioned statute does not affect the principles of decision, recognised by the law of Upper Canada, at the time of its passing, and that that act applies to

Lower Canada only, and to actions and proceedings in the courts in that part of the province; and the utmost effect that can properly be given to the circumstance of its being passed by the common legislature of Upper and Lower Canada is, that the courts of Upper Canada are bound to take notice of the statute, without further proof.

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He contended that the same point had been decided in *Hervey* v. *Jacques*, (*a*) and *Hervey* v. *Pridham*, (*b*) and that the fact that *Holcomb* resided in Upper Canada, while the contract was to be performed in Lower Canada, was sufficient to bring the case within the rule of decision in Upper Canada as to the limitation of actions. *Sichel* v. *Borch*, (*c*) *Ferguson* v. *Fyffe*, (*d*) *Tudor's* Leading Cases on Mercantile Law, p. 255; *Westlake* on Private International Law, p. 233.

[VANKOUGHNET, C.—Suppose, by the law of Lower Canada, notice of dishonour of a bill were required to be in writing under seal, and a common written notice only were shewn to have been sent, I presume no one would contend that our courts were at liberty to dispense with the more formal instrument: what difference can there be when the law in Lower Canada says you must sue within five years; are we at liberty to extend the time, any more than we would be to dispense with the notice I have mentioned?]

Argument.

Here the contract was entered into and complete before the statute was passed; referring to Mr. *Smith's* notes to *Mostyn* v. *Fabrigas*. (*e*)

Mr. *Galt*, Q. C., for the respondent. By the provisions of the statute in question (section 31) it is enacted "that all bills, whether foreign or inland, and all notes due and payable in Lower Canada at the time when this

(*a*) 20 U. C. Q. B. 366. (*b*) 11 C. P. U. C. 329.
(*c*) 10 Jur. N. S. 107. (*d*) 8 Ch. & F. 121.
(*e*) 1 Sm. L. C., at page 641.

1864. Sheriff v. Holcomb. act shall come into force, shall be held and taken to be *absolutely paid and discharged* if no suit or action is brought within four years next after the day on which such bills or notes shall become due and payable; and all such bills and notes made and not due when, or to be made after, this act shall come into force, shall be held and taken to be absolutely paid and discharged, if no such suit or action is brought thereon, within five years next after the day on which such bills or notes shall become due and payable."

If the effect of *Holcomb's* being resident in Upper Canada is to render him liable to be made pay the note sued on in this case after the lapse of five years, he would be unable to enforce contribution from his partner who, it was shewn, had been the contracting party throughout the whole transaction, and resident in Lower Canada. An endorser can only be responsible according to the law of the country where the note was made. Here one of the conditions to the defendant's continuing responsible is, that the note shall be sued on within five years from the date of its maturity.

Argument.

Mr. *Anderson*, on the same side. The point really in issue here may be divided into two questions: First, is the act now under discussion really a statute of limitations. And second, if so, and passed by the legislature having jurisdiction over the whole province, whether it does not bind parties resident in Upper as well as those residing in Lower Canada? But if wrong in that respect, then he contended on the principle of the *lex loci solutionis* prevailing over the *lex loci contractus*, that the defendants would be entitled to judgment, and here the case was stronger, for Montreal was the *locus contractus* as well as the *locus solutionis*. The learned Chief Justice, in disposing of *Hervey* v. *Jacques*, says, "We are not asked to admit its operation merely upon the ground of comity of one independent nation or people towards another, but the statute in itself is a direct binding obligation upon us." There is not therefore any ques-

tion here as to the power of the legislature to bind Upper Canada. The only one is a question of construction of the language of the statute, which he contended was clearly in favour of the judgment pronounced by the court below. Citing *Don* v. *Lippman*, (*a*) *Gibbs* v. *Fremont*. (*b*)

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SPRAGGE, V. C.—The note in question was made in Montreal, by a firm carrying on business in that place, and was made payable at Montreal. The endorsement by *Henderson* and *Holcomb*, by the hand of *Henderson*, must be taken to have been in the ordinary course of the business of *Henderson & Holcomb*, otherwise *Holcomb* would not be liable at all: the business of that firm was carried on at Montreal. The whole transaction was a dealing in Montreal, and was not less so from the circumstance of *Holcomb* being a resident of Upper Canada.

Judgment.

The note is clearly within the provisions of the act; and according to its terms, must be held to have been absolutely paid and discharged at the expiration of five years from the date of its becoming payable. I think the statute (*c*) operates to extinguish the debt, at the expiration of five years without suit, and not to bar the remedy only.

When, by the law of the country where the contract is made, the remedy only is barred, the weight of English decision is certainly in favour of the case being governed by the *lex fori*. This may be open to question upon principle, and Dr. *Phillimore*, in his elaborate work (*d*) upon private international law, observes that the preponderance of reasoning and authority seems to be against the principle maintained by English law; and he quotes, with approval the language of *Savigny* upon the point, "according to all true principles, the law of the

(*a*) 5 Cl. & F. 15.
(*b*) 9 Ex. 25.
(*c*) Con. Stat. L. C. Ch. 64, sec. 31.
(*d*) Vol. iv., p. 157.

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place of performance should prevail. The reasons upon which the law of prescription is founded are intimately connected with the nature of the obligation; and, apart from this ground of theoretical justice, the practical equity of the doctrine is obvious. It takes from each of the parties all power of making an arbitrary selection which may be injurious to the other. So in the case of a variety of jurisdictions to which recourse might be had, it prevents the injustice which the plaintiff might commit, by selecting that which recognises the longest term of limitation; and it will not allow the defendant, by transporting his domicile within the jurisdiction which recognises the shortest term of limitation, to defraud the plaintiff. The time of prescription has been immutably fixed for both, at the time of the contract, by the law of the place in which it is agreed that it shall be fulfilled."

Judgment.

We are, of course, bound by Engliish decision; but there is so much force in the reasoning in favour of the law of the place of performance of the contract, being the law to govern on the question of prescription, as well as of the interpretation of the contract, that I think the doctrine of the English courts upon that point should not be carried further than it has already gone.

The distinction taken by Mr. Justice *Story*, excepting out of the rule of the *lex fori* cases, where the Statutes of Limitations of a country not only bar the remedy, but extinguish the debt, with the qualification he appends to it, is approved by Sir *Nicholas Tindal*, in *Huber* v. *Steiner*,(*a*) and by Lord *Brougham*, in *Don* v. *Lippard*,(*b*) In the former case the learned Chief Justice said "undoubtedly the distinction, when taken with the qualification annexed to it by the author himself, appears to be well founded. That qualfication is 'that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case,' and with such restrictions it does indeed appear but reasonable

(*a*) 2 Bing. N. C. 211. (*b*) 5 C. & F. 16.

that the part of the *lex loci contractus*, which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded by the foreign country as the part of the *lex loci contractus* which gives life to, and regulates the construction of the contract; both parts go equally *ad valorem contractus*, both *ad decisionem litis*."

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Mr. *Smith*, whom Dr. *Phillimore* justly styles the very learned and accomplished editor of the English "leading cases," reasons upon this qualification of Judge *Story* in language with which I entirely agree. (*a*) "Supposing," he says, "the law of a foreign country to be, that a contract is, after a certain time to be deemed absolutely extinguished, it seems not quite reasonable to say that the removal of the parties out of the jurisdiction, while that time is running, should authorise the courts of this country to consider it *in esse* after the period prefixed. The authorities establish, that the law of the country where the contract is made must govern it, and must be looked on as impliedly incorporated with it. Now, if the contract had contained a proviso that it should be absolutely void, if not enforced within a certain time, no doubt the English courts would hold it void after the expiration of that time. But what differenee can it make that such proviso is implied from the law of the country where the contract was made, instead of being expressed in terms? Is it not in both cases equally part of the contract? If, indeed, the rule of the foreign law be, that the contract shall, after the lapse of a certain time, become void, provided that the parties to it continue to reside all that time in the same country, the arrival of the period prefixed for its voidance will depend on the contingency of their abstaining from absenting themselves; and, if they leave the country, never will arrive at all; and this is, perhaps what Judge *Story* intends by the words 'that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case.' For if

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(*a*) Smith's L. C. 642.

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the law be so framed as to operate upon the case, without such residence, the qualification appears to be inapplicable."

Dr. *Phillimore* concurs in this reasoning of Mr. *Smith*; and I must say that to me it appears unanswerable. It is not necessary, however, in this case to impugn the qualification which Judge *Story* annexes to his proposition, for he applies it evidently only to a change of residence after the contract entered into; as Mr. *Smith* expresses it, "the removal of the parties out of the jurisdiction while the time is running." In this case there has been no removal; the special case states—"Henderson has always, at the time of, and since the making of the note, had his domicile in Montreal, in Lower Canada, and Holcomb, in Toronto, in Upper Canada."

Judgment.

Then, taking the law applying to such a contract to be incorporated with the contract itself, it is as if the parties had agreed that the contract should subsist only for five years after it matured, unless sued upon; no change of circumstances has taken place: the holder of the note has had all along to bring suit in case of default against the same parties, and in the same local jurisdiction, as when the contract was made. Suppose the law had been expressed in the contract, and the plaintiff suing upon it, had set it out in his declaration, what fact could he have avowed to prevent its being demurrable?

I should, therefore, have felt obliged to hold the debt extinguished even if the law applying to the contract had been that of a foreign country. Its being an enactment of the Legislature of Upper and Lower Canada makes the case stronger for the defendant. We do not give effect to it from the comity of nations; it is *binding* upon the courts of Upper as well as Lower Canada. The act provides in effect that all bills and notes due and payable in Lower Canada, after a date limited by the act,

shall be held to be absolutely paid and discharged, if no suit or action be brought within five years after the same shall become payable. An action is brought upon such a note after five years; none before. Is it not brought upon an extinguished debt? It is so, unless we are at liberty to engraft qualifications upon the statute which the legislature has not thought fit to make. There is nothing in the act that indicates an intention that the 31st clause was not to apply, when one of the parties liable was a resident of Upper Canada. If that distinction had been presented to the legislature, I do not know that it would have been adopted: there are, I think, sound reasons why it should not; but if I thought such a distinction ever so reasonable, and its absence ever so mischievous, still I do not find it in the act. The courts cannot prolong the liability of parties upon any notion of theirs as to an unexpressed intention of the legislature. I make these observations because it would be necessary to go all that length, in order to hold the 31st clause not to apply when one or more parties liable are resident in Upper Canada.

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Judgment.

I think the judgment appealed from, right, and that the appeal should be dismissed with costs.

HAGARTY, J.—The defendant *Holcomb* was in partnership with *Henderson*, and their business was carried on in Montreal, where *Henderson* resided; *Holcomb* always residing in Upper Canada. The note sued on was made by the firm of *Hooker, Jackes, & Co.*, in Montreal, payable at the bank there, and was endorsed by *Henderson*, the defendant's partner, in the name of the firm, in Montreal.

The case relied on by the appellant of *Hervey* v. *Pridham*, in the Common Pleas, differs materially from this case. The judgment in that case was upon demurrer. The declaration charged the defendant *Pridham* as the maker of a note (not averring that he had any Lower

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Canadian partner, or carried on business there) to one *Hooker*, or order. The plea averred that the note was made and payable in Montreal, and set up the five years bar.

The replication averred that neither of the payees lived in Lower Canada, and that *Pridham*, the maker, at the time of making the note, and since, always was a resident of Upper Canada.

In the present case the facts are very differently stated. It shews a note duly endorsed in Lower Canada by the resident partner of a firm trading there, and I do not see how this contract, so made, can be governed otherwise than by Lower Canada law.

I concur in dismissing this appeal, without deeming it necessary to re-consider the reasons assigned for the judgment in *Pridham's* case.

Judgment.

MORRISON, J.—I am of opinion that the defendant is entitled to judgment. It is admitted in the case that the note, the subject of this action, was made at and payable in Montreal, in Lower Canada, dated 26th of October, 1857, payable two months after date. That after it fell due five years had elapsed before the commencement of this suit. By the 31st clause of chapter 64, (Con. Stat. of L. C.,) it is enacted, that all notes due and payable in Lower Canada, made after the 1st of August, 1849, will be held to be absolutely paid and discharged if no suit or action has been brought thereon within five years after the day on which such notes became due and payable. I can hardly find words stronger or more precise to indicate that the intention of the legislature was to extinguish the liability of all parties on any such note; nor can I place any other construction on the clause itself. This is not the case of a foreign law. It is our own legislature that speaks; and if the legislature had in contemplation that the clause in effect should be read as contended for by the plaintiffs, that any such note

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when prosecuted in the courts of this section of the province should be subject only to the Statute of Limitations in Upper Canada, it would, I think, have so manifiested its intention by express words: and as I see no ambiguity—nothing inconsistent or unreasonable in the enactment itself, I am bound to read it and construe it according to its plain literal meaning, and I do not feel myself at liberty to restrict its operation. I am therefore of opinion that the plaintiff is barred, and that the judgment of the court below should be affirmed.

[*Before the Hon. J. B. E. Vankoughnet, Chancellor, The Hon. W. B. Richards, Chief Justice of the Common Pleas, The Hon. Vice-Chancellor Spragge, The Hon. Mr. Justice Hagarty, The Hon. Mr. Justice Adam Wilson, The Hon. Mr. Justice John Wilson, and The Hon. Vice-Chancellor Mowat.*]

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

WESTACOTT v. POWELL.

Seduction—Loss of service—Birth of child.

In an action for the seduction of the daughter of the plaintiff, the action may be maintained before the birth of the child; and,

Per curiam, the statute (7 Wm. IV., chapter 8, Con. Stat. U. C. chap. 77) does not dispense with evidence of a pecuniary loss or damage, such as was required before the act.—[*Spragge*, V. C., and *A. Wilson*, J., dissenting.]

This was an action for seduction of the daughter of the plaintiff, tried at the assizes held in the city of Toronto in the spring of 1864. The declaration was in the common form. Plea, not guilty. The only evidence called by the plaintiff was the daughter, who stated her age to be sixteen years, and proved the fact of sexual intercourse in the September previous, and of her being then pregnant in consequence of such intercourse.

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The jury returned a verdict for the plaintiff for $800, and in the following term a rule for a new trial was moved for, on the ground that the verdict was contrary to law and evidence, and upon the grounds of misdirection in this, that the learned judge charged the jury that the action for seduction would lie before the birth of the child. This application the court, during the same term, refused; but gave the defendant leave to appeal to this court, which he accordingly did, assigning as reasons, that the evidence did not shew any cause of action, and the learned judge at the trial should have directed that the action would not lie before the birth of the child, or evidence of sickness, so as to occasion loss of time.

Mr. *Bell*, Q. C., for the appellant.

Mr. *Anderson* for the respondent.

Kimball v. *Smith*, (*a*) *L'Esperance* v. *Duchene* (*b*) *McIntosh* v. *Tyhurst*, (*c*) *Egan* v. *Grimwood*, (*d*) *Hewitt*, v. *Prime*, (*e*) *Grinnell* v. *Wells*, (*f*) were referred to by counsel.

The points discussed are fully stated in the judgments.

Judgment.

RICHARDS, C. J.—This appeal must be dismissed and the judgment of the court below affirmed, as the only ground of objection to the judge's charge on the trial, and the only ground taken in moving the rule *nisi*, was that the action would not lie until the birth of the child. At common law the action lies for the loss of service, and as soon as the plaintiff's servant becomes ill, in consequence of the wrongful act of the defendant, the right of action is complete. It is true the defendant states in his grounds of appeal that the judge ought to have

(*a*) 5 U. C. Q. B. 32.
(*b*) 7 U. C. Q. B. 146.
(*c*) 23 U. C. Q. B. 565.
(*d*) 1 Exch. 61.
(*e*) 21 Wend. 79.
(*f*) 7 M. & Gr. 1033.

charged the jury that the action would not lie before the birth of the child, *or evidence of sickness, so as to occasion loss of time;* but as this latter ground was not taken either at the assizes or in the court below, it cannot be urged here. 1865 Westacott v. Powell.

As to the effect of the Provincial Statute of 7 Wm. IV., (Con. Stat. of Upper Canada, ch. 77,) I concur in the judgment of the Court of Queen's Bench, in *Kemble* v. *Smith*, (*a*) that the legislature did not contemplate any other change in the law in relation to the action of seduction, than simply to enable the father, or, in the event of his death, the mother, to bring the action, though the daughter was not at the time residing with him or her. In England, the father has been permitted to recover where the daughter was seduced whilst temporarily absent; and in a comparatively recent case, (*b*) a verdict was sustained where the daughter was living with the defendant, attending his shop during his wife's absence, and this on the ground that the plaintiff had lent his servant for a short time to the defendant, during which period he seduced her. Judgment.

In many cases the service of the child, in this limited sense, is for the benefit of the father, for he often receives the reward of her services, of which he is deprived when she is unable to labour, in consequence of the wrongful act of the defendant. Even where he does not receive directly the wages of his daughter, yet when she clothes and supports herself from the compensation she receives for her own labour, she relieves her father from the burthen of supporting her; and when she is unable to provide for herself in consequence of illness arising from the defendant's wrongful act, and the father does support her through her illness, he then sustains a direct pecuniary injury from the defendant's unlawful act. I see no practical difficulty in working out the provisions of the statute which has

(*a*) 5 U. C. 53. (*b*) Griffith v. Teetzen, 15 C. B. 344.

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now been nearly thirty years in force in this province. It may be urged that the decisions under it have or may involve some logical absurdities, such as requiring some loss of service to be shewn, where the statute says it shall not be necessary to give proof of any act of service; and no proof shall be received to the contrary. But it seems to me, as to the point now under discussion, that what the legislature meant was simply to make the service, to whomsoever rendered in law, be considered service to the parent, and to place the law in this country in all cases just where it is in England, when the action is brought by the father and the daughter resides with him, and there is no plea denying that she is the plaintiff's servant. The case of *Eager* v. *Grimwood* is authority, that in such a case, before the action can be sustained, some loss of service arising from the defendant's wrongful act must be shewn. I think in the case before us, if the jury were satisfied that the plaintiff's daughter was with child by the defendant, and that she had been pregnant for several months, they might assume some slight illness or inability to serve as effectually as she did before the wrongful act of the defendant; and, if so, the legal right of the plaintiff to maintain the action would be established.

Judgment.

In discussing this matter, I am only considering the effect of the first two sections of our statute, and do not doubt that under the third section, when the action is brought by the master, the same evidence would be necessary to maintain the action as in an action of the same kind in England.

I am therefore of opinion that this appeal must be dismissed, and with costs.

Spragge, V. C.—It is material to consider the state of the law at the time of the passing of our Provincial Act, 7 Wm. IV.

While service, and loss of service, were in theory the

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legal foundation of the action, it had been determined that no evidence of actual service rendered, was necessary; that service would be presumed; that it was sufficient if the daughter was under the control and command of the parent, so that he could require service if he desired it; and as to loss of service, very slight evidence was necessary. In case of the birth of a child, loss of service followed of course; and so in the case of sickness caused by pregnancy: and if Lord *Denman* was right, in *Joseph* v. *Cavandar*, the birth of a child was not necessary to constitute the action, but the fact of pregnancy was sufficient. It would appear rather as if the loss of service must be negatived; as if it must be shewn that, from the relative position of the parent and child, there could be no loss of service; as where the child was living in service away from the parent, or an apprentice with the person who seduced her, or otherwise absent without any intention of returning to her parent; and even in the case of absence, the courts have got over the difficulty where the legal relative position of master and servant could still be maintained, as in the case of the absence of the child on a visit, by reason of the *animus revertendi*.

Judgment.

In England the right to service and the loss of service, have long been regarded as mere technical grounds for the maintenance of the action. As long ago as when Lord *Eldon* was Chief Justice of the Common Pleas we find him using this language:—"In point of form the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to her child: in such case I am of opinion that the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter," &c., *Bedford* v. *McKowi*; (*a*) and other judges have expressed the like sentiment in different

(*a*) 3 Esp. 120.

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language. Indeed the amount of damages given in such actions and sustained in *banc*, shews conclusively that the loss of service is the technical cause of action only: while, in the language of the late Chief Justice, Sir *John B. Robinson*, "the grievance which the law regards and desires to afford redress for, is the injury to feelings, the mortification, the domestic unhappiness, the blighted hopes, which follow the seduction. *L'Esperence* v. *Duchene*.

This being the state of the law, the statute of William was passed, and it recites, "whereas in some cases the law fails in affording redress to parents whose daughters have been seduced." The seduction is put forward as the wrong for which the parent ought to have redress; and in the failure of the law in some cases to afford such redress, is the defect in the law which the new statute was avowedly intended to remedy. If the law failed in some cases to afford redress by reason of the existence of mere technical difficulties, it would certainly be the intent of the new statute to remove them; so that they should no longer stand in the way of redress for that which was the real injury. It may be that the statute does not do this effectually, but we must construe the statute, keeping in view the intent with which it was passed.

Judgment.

The great technical impediment in England has been, that the right of action was founded upon the relative position of parent and child, being, *quoad* the action, that of master and servant; whence it followed that the action failed in certain cases, to which I have referred; the child being a hired servant elsewhere, or an apprentice, or so absent as to negative for the time the right of the parent to the service of the child. The failure of justice in this class of cases is remedied by the first section of the act, which provides, that in cases where the parent could maintain the action, in case the child were dwelling under his or her protec-

tion, he or she may maintain it, notwithstanding that the child was at the time of seduction serving or residing with any other person, upon hire or otherwise. I say that the failure of justice in this class of cases is remedied, because I apprehend the courts would feel no difficulty in holding the action to apply, where the absence was not till after the seduction. I take it the time of seduction is named in the Act, because the act of seduction is intended to be made the cause of action.

Then, the second section dispenses with proof of service; directs that it shall in all cases be presumed, and that no proof to the contrary shall be received. The third section provides that any person, other than the parent, who, by reason of the relation of master and servant or otherwise, would, before the passing of the act, have been entitled to maintain the action, may still maintain it if the parent, who might sue according to the act, shall not be resident in the province at the time of the birth of the child; or, being resident, shall bring no action within six months thereafter.

Judgment.

It is objected that the second section only dispenses with proof of service, not with proof of loss of service. It does more than dispense with proof of service, it allows no evidence to be given in disproof of it; and the first section gives a right of action in circumstances where there could be no service. It does appear to me that to require proof of loss of service, is to nullify the provisions of these sections of the act, especially the first: for if there is no service—if the position of parent and child is such that the child is not under the command and control of the parent—that the parent is not in a position to exact the service of the child, there can be no proof of loss of service, simply because loss of service is inconsistent with the relative position of parent and child.

It will hardly be contended, I suppose, that loss of service must be proved in some cases, and need not

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be proved in others; that where there is service, then loss of that service must be proved. There is nothing in the act to indicate this: the object, scope and tenor of the act are all against it; and it would be an anomaly. The second section of the act is the one that applies to cases where there may be actual service. But suppose evidence offered to shew a state of circumstances in which, though the child were living with the parent, there could be no service rendered, or that in fact no service whatever was rendered, such evidence would not be receivable. It would surely be inconsistent with the rejection of such evidence to require proof of loss of service.

I think that the preamble and the sections of the act to which I have referred, all manifest an intention to abrogate the technical ground, upon which the action was previously founded, where the action is by the parent. One phrase in the 2nd section may appear to militate against this—that acts of service shall in all cases be *presumed*; but this single expression is not sufficient, I think, to countervail so much that is of an opposite tendency. My conclusion is, that loss of service need not be proved. What is proved in this case is the seduction, and consequent pregnancy of a young creature, who, when she gave her evidence, was but sixteen; proved, it must be taken, to the satisfaction of the jury. Looking at the statute, independently of the ruling of *Denman*, C. J., I think the cause of action was complete without the birth of the child, and without proof of sickness, or of a condition entailing loss of service. I think in the 3rd section the birth of the child is merely made the time to limit the period, after which another than the parent may bring the action; and that there is nothing in it to prevent the parent bringing the action before that time.

Judgment.

It has been suggested, as a difficulty in the way of bringing the action before the birth of the child, that the

loss of service and expense attending that event might give a new cause of action; the answer seems to be that the birth of the child, being the natural result of that for which damages have already been recovered, can furnish no new cause of action.

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HAGARTY, J.—I think that our statute has had the effect of establishing conclusively the relation of master and servant between the parent and a daughter said to be seduced; and that any wrong done to the servant, the effect of which is to render her less able, or unable to do her master's business, is a good cause of action. It is unnecessary to prove that she was in the actual service, or actually performed any service: the statute gives her that position, and if she be disabled from performing or doing service, the law assumes there was such service to be done, and will receive no proof to the contrary. It contents itself with proof of the disability or lessened ability to do the service. This, I think, is the view of the courts heretofore; and *L'Esperance* v. *Duchene* takes that view in substance. A father, I consider, acquires no right of action against a defendant merely for an illicit connexion with the daughter, not causing illness, &c. As the late Sir *J. B. Robinson* says, "Few things could be less desirable than that parties should be encouraged to suppose that an action for seduction could be maintained upon the mere proof of criminal intercourse, not followed by the birth of a child, nor even by pregnancy."

Judgment.

I think the action is maintainable before the birth of a child, if proof be given of a pregnancy, proved to have caused illness or weakness, in any sensible degree affecting the ability of the servant to work for, or serve the master, (*i.e.*, in nearly every case the parent.) If any injury or sickness followed the act of intercourse creating the same disability, the cause of action would be equally complete.

I cannot accede to the proposition stated thus, that

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connexion, followed by pregnancy, gives a cause of action. Add to it the qualification above suggested, as to disability, and I think it is law. Without such addition, a very absurd consequence would follow; namely, that if a daughter had connexion with a person, and in four or six weeks after was accidentally killed, and on examination of the body it was found that pregnancy had ensued, the action would lie from that fact, although it had never affected her ability to serve her master, and although she herself might be unconscious of its existence.

I see no other course than to adopt the view above suggested, that no action lies unless the ability to serve be affected.

But as the only point raised on the rule in the Queen's Bench was, whether the action would lie before the birth of a child, I think the judgment below must be affirmed. For the reasons above given I think the action may, under certain circumstances, lie before the birth of a child.

Judgment.

A. WILSON, J.—The reasons of appeal go beyond the rule moved for, and if the defendant were held strictly to the terms of the rule which he moved, the appeal should be dismissed, and, as I think, must be dismissed on this ground, because it is perfectly clear that, as the action for seduction will lie before the birth of a child, as a mere abstract proposition of law, the learned judge was quite right in directing the jury accordingly.

But this case has been argued, though not with the consent of the plaintiff's counsel, upon that portion of the reasons of appeal which states that the action will not lie before the birth of a child *or evidence of sickness so as to occasion loss of time*, and it has been pressed before us, because the learned judges of the court below, it is said, understood the motion to have been made in the

larger sense, and refused it peremptorily without commenting upon the precise nature of the motion, in order that the case might be reviewed on appeal, if the defendant desired to prosecute it further: that we ought now to give our opinion on the rule as it ought to have been, and not only as it has been moved.

Judges do occasionally express an opinion beyond the strict boundary of the proposition before them, but not very frequently, because it is not binding in law, however fully it may be accepted as a correct exposition of the law.

As the case has been argued beyond the terms of the rule, I shall express my opinion *quantum valeat*. But for our statute relating to this kind of action, this declaration would be held to have contained three traversable facts.

Judgment.

Firstly, that the woman was the daughter or servant of the plaintiff.

Secondly, that the defendant was guilty of the act charged upon him; and

Thirdly, that the plaintiff had, by means of the defendant's act, lost the services of the woman.

The second and third facts are included in the general traverse of not guilty: the first must be the subject of a special traverse.

In actions of this kind, when they are brought by a master, and not by a parent, the declaration must, notwithstanding our statute, be framed as at the common law, and all these three facts are still traversable.

In this case the relationship of father or master is not denied. The only facts then traversable at the common

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law are, that the defendant debauched and carnally knew the young woman, and that his act occasioned loss to the plaintiff.

Now the statute declares, that when the parent brings the action it shall not be necessary to give proof of any act of service performed by the person seduced, but the same shall in all cases be presumed, and no proof shall be received to the contrary. From this it follows that it would be an idle traverse that the plaintiff had not lost his daughter's services, if the defendant could have specially pleaded to it; it cannot therefore be covered by the general traverse of not guilty. I see no difference between giving no proof of any act of service, and giving no proof of any loss of service, for if there be no *act* of service, there can be no loss of service; and if there is to be no proof received denying any acts of service, it must be because no acts of service are necessary. Loss of service implies of necessity that there is a service which has been lost, but if the service is dispensed with, or need not or do not exist, and if by law its non-existence is not even to be affirmed, it is unreasonable to say that this same law still contemplates a loss of service as surviving; it is an impossibility, as well in law as in reason, and therefore I treat the statute as dispensing, by inference irresistible, with proof of loss of service as well as of acts of service. In this view, what is not to be proved and is not to be controverted but is to be presumed, cannot form an important ingredient in the action. The plaintiff is obliged only to state such circumstances as are necessary to constitute the charge which is made, and all beyond is surplusage, for the object of pleading is to evolve some question either of fact or law disputed between the parties, and mutually proposed and accepted by them as the subject for decision,—it is to ascertain the subject for decision. But as no proof is to be given of the loss of service, and none is to be received to the contrary; it is manifest that the question of loss of service is not intended

Judgment.

uselessly to be evolved, when no dispute can arise about it, and it can never form the subject for decision. 1865.

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I am therefore of opinion, as the recovery must always be, *secundum probatâ et allegata*, that it is not necessary, when the action is brought by a parent, that there should be any allegation whatever of the loss of service. It is now by the statute an idle and superfluous statement.

What then remains to be tried in such a case, when not guilty only is pleaded? Nothing more than whether the defendant had carnal knowledge of the plaintiff's daughter. If this be so, then the remedy is given to the parent for the mere seduction of his child, and the act of fornication, if it constitute seduction, is made a punishable offence. This must be the result. But how can it be avoided? The declaration is plainly made that the parent may maintain an action for seduction without proving loss of service, even although the daughter was at that very time serving or residing with another person upon hire or otherwise. Suppose the defendant to entice the daughter from school and to cohabit with her for some weeks, can it be said, although the daughter has not had the further misfortune to become pregnant, that an action cannot be maintained under this statute, merely because acts of service have not been performed by the child, and loss of service has not been sustained by the parent? Judgment.

How could the daughter in such a case render acts of service? And is this enticing and prostitution of the child to be left unpunished? Is it no injury to the parent? Is all recompense to be denied for the injury which has been done, because that injury has not been increased as much as it might have been? and according to this reasoning, should have been before the parent had any cause of complaint.

This is to repeal the statute, and to revive the fiction

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of service, but not as before, to afford a remedy; but for the mere purpose of defeating redress for the only actual wrong which has been done, and which always was the only ground upon which damages were awarded.

The decisions of our courts have certainly not been in accordance with this view.

But according to the best opinion which I can form from the language of the statute, I think the legislature has expressly given to the parent a remedy against the seducer of a daughter for the act of seduction alone; that act having always been the gravamen and substantial ground of action, and the loss of service being merely the form to be complied with in any way, so long as it was complied with, to enable a recovery for the substantial ground of action to be had. No doubt this may be a dangerous power to be placed in the hand of a parent, as it may be enforced on every occasion when the daughter may be pursuing a life of prostitution; and yet there can be no difference made between the child who has made but the one lapse from virtue, and whose single act has led to her ruin and brought affliction upon her family, and the child who is following a course of profligacy from choice, unless in the latter case the act of fornication can be distinguished from an act of seduction, which it is not impossible to do.

Judgment.

But if the statute does not confer this right on the parent for the mere act of seduction, and if it is not necessary that he should have sustained any loss of service to entitle him to sue, when is it that his cause of action does accrue? Is it to be upon the delivery of the daughter of a child, and if so, why then? Her delivery does not necessarily, in law, imply that there has been a loss of service, and it may happen that she may not be delivered at all; she may die in child-birth, or before the time of her delivery has arrived. Is it

then upon her pregnancy, and if so, why then? There may be no loss of service during such time. Is it when the parents discover the injury they have suffered by the corruption of their child? If not then, why not? What further is to be waited for under this statute? 1865. Westacott v. Powell.

I can see no reason why the parent should not sue, then, and if so, the remedy is, as I think the statute has made it, for the mere act of seduction. The law would seem to be very defective in leaving wholly unprotected the chastity of women, excepting by this incongruous and very unsatisfactory mode of redress, in which the person not directly wronged is the person who gets the recompense, and the person who is the most wronged recovers nothing.

The legal principles in awarding damages in this form of action have been long disregarded. *Irwin* v. *Dearman*. (a)

Judgment.

The mere fiction of loss of service, standing as an impediment in the way of a recovery for the actual wrong, has ever been practically regarded as not satisfactory or creditable to the law. The substantial remedy has always been for the wounded feelings of the parent "for the loss which the father has sustained, by being deprived of the society and comfort of his child, and by the dishonour which he receives; for the distress and anxiety of mind which the mother has felt, and for losing the comfort, as well as the services of her daughter, in whose virtue she can feel no consolation." This is the language of the judges in some of the cases of this kind. If this view of the statute encourages some improper actions, it is yet infinitely better it should be so under the restraining influences of the courts, and of juries, than that the most afflicting and lasting injury which can befal a family should be left unpunished, simply because the daughter cannot be proved to have been a servant in her father's house,

(a) 11 East 23.

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and because her father has not lost her services: facts which scarcely ever were proved but by the distortion and perversion of the evidence, and by the acceptance of the wildest fiction, for the purpose of defeating the settled rules of law.

I think the declaration sufficient in form, and I think the evidence is sufficient also to sustain the verdict, for it shews the plaintiff's daughter was an unmarried woman, and had been seduced, and was pregnant by the defendant; pregnancy being certainly sufficient to confer a full right of action on the plaintiff; and from what I have said, the mere act of seduction is now, in my opinion, the true and only cause and basis of action under the statute, when the action is brought by a parent.

I think, therefore, a declaration which alleges that the young woman was the daughter of the plaintiff, and was unmarried, and had been seduced by the defendant, would be a sufficient declaration under the statute, for it contains all that it is necessary to prove, and therefore all that it can be necessary to allege.

Judgment.

MOWAT, V. C.—I concur with the other members of the court in holding that an action of seduction will lie before the birth of the child. As to the question which was argued before us on the construction of the Upper Canada Statute, and on which there is a difference of opinion amongst us, I may say that I agree with those who are of opinion that the statute is not so expressed as to dispense with the technical necessity, in a suit like the present, of giving the same sort of evidence as was previously necessary, of damage, however slight, having been sustained by the father, as the consequence of the defendant's wrongful act.

The other members of the court concurring:

Appeal dismissed with costs.

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ON AN APPEAL FROM THE COURT OF CHANCERY.

NORWICH v. ATTORNEY-GENERAL.

Advance under Consolidated Municipal Loan Fund Act—Discharge of railway stockholders by act of Parliament—Consequent claim for equitable relief.

Where a township municipality advanced a large sum of money to a railway company, under the provisions of the Consolidated Municipal Loan Fund Act, and some of the stockholders of the company were afterwards released from their liability by an act of the Legislature, passed nearly eighteen months after the works on the road were stopped for want of funds, and new companies were formed under that and subsequent acts of the Legislature, which released the new corporations from the construction of the original line of road, until a new line had been constructed, and it appeared that there was no immediate prospect of such a result. *Held*, reversing the judgment of the court below, that the municipality was not released from their liability to the Crown. (V. C. *Spragge dissentiente.*)

In 1854 the township of Norwich, in the County of Oxford, advanced to the Woodstock and Lake Erie Railway Company, under the authority of the Consolidated Municipal Loan Fund Act, $200,000, to aid in the construction of the road which was to run through the township. A by-law of the corporation had been previously passed for that purpose; and government debentures were accordingly delivered to the agents of the company, conformably to the provisions of the act. The company also gave their bond to the municipality, to pay the debt to the township treasurer, comformably to the terms of the loan. Statement.

By means of the advance in question, with other similar loans made by neighbouring municipalities, the railway company commenced operations early in 1854; purchased the harbor of Port Dover, which was to be the southern terminus of the line; procured the right of way for part of the distance, and graded a small portion

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of the road. Nearly $800,000 were expended in this way; but the work was stopped for want of funds in January or February, 1855. According to the contract, the road, including rolling stock, was to cost $1,824,000: but only an inconsiderable portion of what was required by the contract had been constructed: and unpaid calls, to the amount of about $200,000, constituted all the existing assets of the company.

Matters stood in this way till the 19th of June, 1856, when the act of 19th Victoria, chapter 74, was passed; the 7th section of which authorized the shareholders to surrender their stock, and be then discharged from any further liability. Several of the stockholders were discharged accordingly, who were responsible for the claims against them. But it appeared that the municipalities had agreed to take the company's bonds for the previous advance, which should be postponed to first mortgage bonds to be issued by the company, to the amount of $4,000,000. This agreement was made on the 10th of March, 1856, and was confirmed by the act.

Statement.

The Woodstock and Lake Erie Railway Company was amalgamated in 1858 with the Amherstburg and St. Thomas Railway Company, under the name of "The Great South Western Railway Company:" and the deed of amalgamation was confirmed by the 22nd Victoria, chapter 118, (passed 18th August, 1858.) The 23rd section of this act annulled all contracts relating to the lines of road of either of the amalgamating companies; and the new company was released from constructing the branch from Woodstock to Lake Erie, till the main line should be completed, and it earned eight per cent. over all expenses. It was also recited in the deed (which is set out at length in the act) that a majority of the municipalities interested consented to the amalgamation.

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The 22nd Victoria, chapter 90, (2nd session) repealed all the preceding acts, and formed a new company, called "The Niagara and Detroit Rivers Railway Company," which was authorized to construct a railway from Clifton, on the Niagara River, passing through the towns of Simcoe and St. Thomas, to some point on the Detroit River, near Windsor or Sandwich, with a branch from the Eastern terminus to Fort Erie, and requiring the new company to construct the Woodstock and Lake Erie branch, as soon as the net revenues derived from the other parts of the line should amount to eight per cent. of the capital expended. By the 27th section, the new company were required to assume and pay to the provincial government the sums loaned by the municipalities, with interest.

The new company did not construct any portion of their lines. The Woodstock and Lake Erie Railway Company paid the first instalment of principal and interest due on the loan: but no subsequent payment was made by any party. The Receiver-General, therefore, early in 1862, reported the matter to his Excellency the Governor-General, who accordingly issued warrants to the sheriff of Oxford to collect the arrears, conformably to the provisions of the Municipal Loan Fund Act.

Statement.

The Township of South Norwich then filed a bill of complaint in Chancery, praying to be relieved from any further liability, on account of the said acts of the Legislature, which, they charged, had prejudiced them. They charged that, under the circumstances, they were only sureties for the railway company, and that, as the Legislature had, in effect, released certain of their stockholders, and postponed the construction of their line of road, they were in equity discharged from any further liability. They also charged that the Crown had taken the new railway company as its debtor,

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Besides the Attorney-General and the sheriff of Oxford, the township of North Norwich (one of the two municipalities into which the old township of Norwich had been divided in the meantime) was made a party defendant; and some contingent relief was prayed against them.

The answer of the Attorney-General admitted the acts of the Legislature set forth in the bill, but put the plaintiffs to the proof of the other allegations of the bill. He also demurred to the jurisdiction of the court. The bill was taken *pro confesso* against the sheriff of the county of Oxford. The answer of the township of North Norwich admitted all the allegations of the bill, and submitted their rights and interests to the protection of the court.

Statement.

An *interim* injunction was granted on the application of the plaintiffs, and the cause came on for examination of witnesses and hearing at Hamilton, in March, 1863, before his Honor *V. C. Spragge*, when the facts above set forth were given in evidence. It further appeared that the construction of the railway along the original line would have greatly benefited the plaintiffs; that the money expended had been of no benefit to them, and that the stockholders refused to advance any more money before the work stopped. The secretary of the original and amalgamated companies also testified that if the stock had been paid up, there would have been, he thought, sufficient funds to finish the work, but it did not appear whether he referred to the old or the new company's stock. He also testified that, in his opinion, the line from the Niagara to the Detroit River would pay eight per cent., if built through from one river to the other.

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After argument the court decided that they had no jurisdiction, (*a*) and directed the bill to be dismissed with costs. But before the decree was entered, an order in council was passed (June 1864) waiving the question of jurisdiction, and submitting to have the cause decided on its merits, as the plaintiffs could not otherwise have justice done, owing to an omission in the acts of parliament relating to the court.

The cause was then, 30th June, 1864, brought before the court on the merits, when his Honor Vice-Chancellor *Spragge* gave judgment conformably to the prayer of the bill; and a decree was made accordingly. From that decree the Attorney-General appealed, which came on for argument on the 29th December, 1864.

Argument.

Mr *McGregor*, for the appellant, contended that the municipality was the principal debtor, and not merely a surety. In proof of this he referred to the Consolidated Municipal Loan Fund Act, (16th Victoria, chapter 22, sections 5 and 6,) which directs that the advances be made to the municipalities, not to the parties who are ultimately to receive them, and that the remedy is given against the former exclusively. He also shewed that the by-law of the township (dated 1st December, 1853) authorized a loan by the township to the company, to aid in the construction of the railway, and directed the money to be borrowed and raised on the credit of the Consolidated Municipal Loan Fund. He also shewed that, although the debentures were delivered to the company by the Receiver-General, they were debited to the municipality, so that the payment to the company was merely to save trouble, as they were ultimately to receive them, and was no indication that the Crown ever looked to the company as its debtors. He also referred

(*a*) 9 Grant 568.

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to the bond given by the company to the municipality, which recited the loan by the latter to the former, and bound the company to pay, not the Receiver-General, but the treasurer of the municipality, the amount of the advance, with interest at eight per cent.

He also contended that the Crown is distinct from the Legislature, (referring to May's Constitutional History of England, vol. I., page 473,) and not bound by any act of the Legislature, unless specially stated as to be bound by it, which was not the case here, (1 *Blackstone*, 361, and *Chitty's* Prerogative of the Crown, p. 382.)

He further argued that the municipality had not been damaged by the acts of the Legislature complained of. It appeared by the secretary's evidence, that about $640,000 had been expended in what the plaintiffs' own bill truly stated to be "only a very insignificant portion of the works," while the railroad was to cost, according to the contract, $1,824,000, and the only available means for its completion, when the works were stopped, was only about $200,000 of unpaid stock, which the holders refused to advance; and he argued that if these holders were responsible, and there were available means for completing the road, then was the time for the municipality to apply to the Court of Chancery for relief, to compel the advance of that stock. But they took no such step, because, no doubt, they were convinced that it was not for their interest to do so, and that there were actually no means for finishing the road. Instead of that, they did nothing for several years, till the sheriff was at their doors, when they applied to Chancery to be relieved from their liability; but not only was there no evidence that the township of Norwich opposed the passing of the acts of the Legislature, now complained of, or utter any expression of disapproval, but the majority of the muni-

Argument.

cipalities, including, he believed, Norwich, actually assented to them, because, no doubt, they thought the formation of a new and stronger company was the best thing that could be done, under the circumstances, and the actual result could not have been anticipated. They preferred the formation of a new company, which *might* give them the road, to merely proceeding against the stockholders, which, at best, would only produce a small sum of money, of no avail towards completing, and much less towards opening, the road. 1865. Norwich v. Attorney-General.

Thus the Legislature, with the plaintiffs' approval, interfered only when the case had become hopeless as it stood, and attempted to put things in a better condition, although in vain, owing to the continued unfavorable state of the times. They could not destroy what was already dead. If therefore the plaintiffs suffered, they had themselves only to blame; and it would be dangerous, and contrary to public policy, to discharge parties in the position of the plaintiffs from liability, unless their right to relief was clear and unquestionable, which, he contended, it was not in this case. Argument.

Mr. *Blake*, Q. C., and Mr. *Wells* for the plaintiffs, and Mr. *Taylor* for North Norwich, supported the decree. They maintained that the municipality were only sureties, and that the company were the principal debtors to the Crown, in proof of which they referred to the fact that the debentures had been issued to the company and not to the township, and that the only payment made on account of the liability had been made by the company, and not by the municipality. They further contended that the townships had been put in a worse position by the interference of the Legislature, as solvent stockholders were discharged; and if these had paid up, there was good reason to think that the road might have been finished by borrowing money on the company's credit; and, at all events,

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they would have had the money thus collected, to be applied towards paying their liabilities. The plaintiffs, it was contended, had advanced their money for the purpose of getting a railroad running through their township, and their reasonable expectations had been wholly frustrated by the interference of the Legislature; as there was no prospect whatever that the line from Woodstock to Port Dover would ever be constructed by the existing company, who had hitherto done nothing at all, and was not likely ever to construct their main line. They also contended that the Legislature had discharged the township by the proviso in the 22nd Victoria, chapter 90, section 27, which, it was argued, substituted the new company in place of the municipality, as the debtors to the Crown. They further contended that the holders of the debentures were the real creditors, and the Crown only a surety, who was entitled to proceed against the company.

Argument.

In support of these contentions, they referred to 33 Henry VIII., chapter 39, section 79; and cited numerous cases decided under it, including Sir *Thomas Cecil's* case, (*a*) *The Bank of Ireland* v. *Beresford*, (*b*) *Pearl* v. *Deacon*, (*c*) and *Bailey* v. *Edwards* (*d*).

Mr. *McGregor*, in reply, contended that most of the cases cited were clearly not in point, as the applicants for relief were sureties, which the plaintiffs were not; and in all the cases cited the plaintiffs had sustained serious and material injury from the acts complained of, which was not the case here. Sir *Thomas Cecil's* case was the only one that was even apparently in point, and it was not so in reality, because the Crown had received a full equivalent for what the plaintiff had bound himself to convey, whereas the case here was quite different, and

(*a*) 7 Coke, 89.
(*b*) 6 Dows, H. L. C. 283.
(*c*) 24 Beaven, 186.
(*d*) 8 New Reports, 877.

the plaintiffs applied to have the Crown claim confined to a company, which they themselves stated in their bill, was wholly irresponsible. The plaintiff here had received the debentures, and the subsequent loss was not the fault either of the Crown or of the Legislature. He also contended that the equity statute was not applicable, as this was not an ordinary case of revenue, but a debt due to the Crown for an advance, and the Consolidated Municipal Loan Fund Act expressly directed that the municipalities should pay the debt. He further contended, that the proviso in the 22nd Victoria, chapter 90, only made the new company responsible for the debts of the old, and that the act must be strictly construed as being in derogation of the rights of the Crown. Had the Legislature intended to discharge the municipalities, they could surely have got a declaratory act passed, expressive of that intention; and the Crown had waited for upwards of a year, to allow the plaintiffs to apply to the Legislature for that or any other relief to which they thought themselves justly entitled, whereas no such application had been made.

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Argument.

Although the Crown was bound to pay the holders of its debentures, yet that did not in the least affect their remedies against the plaintiffs, any more than the fact that a bank was bound to pay the holders of its notes, although it discharged the parties who had borrowed the money. And although the Crown might, under the enactment last referred to, call on the new company to pay, yet the municipality were not discharged, and the remedy against the company was merely collateral.

With reference to the alleged inability of the new company to construct their line, he contended that that would depend on contingencies which could not be foreseen, and that the court could not rightly assume that it would not be constructed, within a reasonable time. Circumstances, as unforseen as those which intervened

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adversely before, might arise in favor of the speedy construction and successful working of the line.

VANKOUGHNET, C.—It is to be borne in mind, in the discussion and consideration of this case, that the Government are not, or at the time of the various occurrences referred to in the bill were not, liable to the holders of the debentures therein referred to for their payment; that these were only payable out of the consolidated municipal loan, to be provided and secured under certain stringent regulations, calculated to give the debentures, issued on the credit of it, value; one of the most important being the assurance implied, and indeed furnished by their issue, that the Government had seen that they were properly and safely secured in the provision of a fund ample for their payment.

Judgment.

In support of the bill many arguments occur to one's mind. Suppose the Legislature authorizing the issuing of debentures for the construction of any particular work; the debentures issued, and the Legislature then destroy that work, or rather declare it shall not be performed, who is to be the sufferer? Is it the municipality or the holders of the debentures?

If there be a surety to the Crown for the performance by a public officer of certain duties, and the Legislature alter these, the surety is discharged. Then here the Government advance out of the consolidated municipal loan fund certain moneys, to or for the township of Norwich, which guarantees to replace them, having collateral security therefor, from a railway company composed of certain shareholders. This collateral security the Legislature destroys. Is not the promise of the municipality to replace the amount borrowed released by this act?

It may be said that the holders of the municipal loan fund debentures, having nothing to look to but this

fund, ought not by the act of the Legislature to be deprived of it; and that the loss should fall on the municipality. But did not the purchasers of the debentures rely as much on the good faith of the Legislature, as did the municipality? and, if the Legislature have taken away from the latter their means of obtaining the amount loaned by them out of these debentures, are the holders of them in any better position than is the Crown as against sureties, for any officer whose duties the Legislature have changed? or for the performance of a contract which the Legislature has materially altered? As to the case of a surety, the Crown of course can require fresh security to be given. If the municipality had issued its own debentures, constituting a direct debt to the holders of them, could it have repudiated them because of any act of the Legislature?

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Here, however, the municipality is not the direct debtor; the holder has no recourse against it, but only against the fund which the Crown is bound to get in; and if that fund fails by reason of the act of the Legislature, what recourse has the debenture holders? Suppose the Legislature directly relieved the municipality without providing payment to the debenture holder, what recourse would the latter have? Does it make any difference that the Legislature has so acted as to change the position and rights of the municipality, and thus relieve it indirectly through the aid of a court acting "on equity and good conscience," from the same liability? If the municipality promised to pay this sum to the Crown on the faith of certain security known to the Crown, and which the Legislature has destroyed, ought its liability to the Crown to be greater than that of a surety whose position and responsibility are altered by the act of the Legislature?

Judgment.

That the Legislature in its omnipotence may put on and take off burdens—may by its interference with

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private charters and rights cause losses and profits, cannot be denied, but the question remains who is to gain or lose thereby? In this case is it the debenture holders; or the Government acting for them; or the municipality? Or, if the rights of the municipality have been impaired, may not the question be left to be settled by the two other parties.

These are all considerations which might have weight, were we at liberty to use them, against the deliberate enactments and policy of the Legislature, omnipotent in dealing with private rights or public questions. We have only to read the various enactments referred to in the bill, and bearing upon the subject, to see that the Legislature considered it for the benefit of all parties, that the old company, upon whose security and obligations the plaintiffs claim they had a right to rely, should be replaced by another company, which should assume the obligations of the former one, and that the liability of the municipality for the debentures issued on its credit should continue. This may be just or unjust. We have no right to say that the action of the Legislature was a wrong to the municipality. There is no evidence that it has been, even were we at liberty to consider it. We know that private rights are not touched by the Legislature without notice to the parties interested, and such consideration of them as the Legislature thinks it right to bestow. This much we may know judicially, for the *Official Gazette*, as well as the established practice of Parliament, informs us of it. Have we then, sitting here as a court, any right to say that the highest tribunal in the land, entrusted with the enactment of laws which we are to interpret and administer, has, in dealing with rights and interests which it considers it proper to legislate upon, acted unjustly, and that we are therefore at liberty to grant a discharge which it has withheld?

Judgment.

However hastily we may think the Legislature has

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dealt with individuals, we are not at liberty, for that reason, to release them. It is said, however, that the Crown being the prosecutor here, and having assented to the bill which altered the position of the plaintiffs, is in equity and good conscience bound to abstain from enforcing its demand. This is, however, confounding the position of the Crown as an independent body, with its position as a constituent of the Parliament which enacts the laws. The Crown merely assents to the bill which the two other estates pass, to enable it to become a statute; and, in doing this, in no way derogates from its own rights, or those of individuals, or adds to them any further than is provided by the statute itself; and it is a rule, that the rights of the Crown are not interfered with unless by the language of the statute. Here, the Crown represents no rights of its own, but merely those of the public, or if it be so insisted on, those of a portion of the public; and as the Legislature, as such, did not mean to forfeit or prejudice these, it cannot be said that the Crown, as distinct from the other bodies of the Legislature, in assenting to their act intended to do so. We think that any mischief that may have been done to the plaintiffs can only be repaired by the power that occasioned it.

Judgment.

SPRAGGE, V. C.—I think the point that we have to decide comes to this, whether the acts of the Provincial Parliament, in regard to the municipality and the railway, for the construction of which the debt was contracted, from which it seeks to be relieved, have been such as to make it inequitable for the Provincial Government to enforce that debt.

The debt, though due nominally to the Crown, is in substance and effect a debt due to the province; only due to the Crown in the sense of the Crown, *quoad hoc*, representing the province as its sovereign; not due to the Crown in respect of hereditary revenue, or the like. The debt arose out of a loan of provincial funds, and

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its payment would be in augmentation of provincial funds; and not the less so because kept separate, and for specific purposes, from the general revenues of the province.

The fund out of which this loan was made has every mark of being a public provincial fund. It is raised under the authority of a statute of the Provincial Legislature. It is managed by one of the great officers of the province, under the direction of the Governor of the Province in Council; and it is raised upon the credit of the province, the debentures of the province being pledged for its re-payment. Loans from it are made only with the sanction of the Governor in Council, his approval being necessary to the by-laws passed for that purpose by the municipalities.

Judgment.

I understand a distinction is attempted to be drawn between the Government and the Legislature of the province. This must mean, if it means anything, that the Government ought to exact the payment of a debt, which the Legislature ought, by reason of the effects of its own acts, to forego; and that a court of equity, seeing that by reason of the acts of the Legislature it would be unjust and inequitable to exact the debt, and having authority to adjudge whether the debt shall be exacted or not, should leave it to be exacted, because it is the executive and not the legislative authority of the province that is the instrument of exacting it.

This distinction appears to me most unsound. The debt in question is a debt due to the province; the affairs of the province are managed by a legislature and an executive; the name of each sufficiently designates the functions of each; the name of the latter imports that its function is to execute what is ordained by the former. If it attempts to do that which, looking at the acts of the Legislature, ought not to be done, it attempts to do wrong and ought to forbear, and if the law of the

province has committed, to any tribunal, authority to pronounce upon the propriety of the officers of the Government doing a particular act, it seems clear to me that it ought so to pronounce, irrespective of any such distinction as is attempted to be drawn. In truth, to admit such a distinction would nullify the judgment that ought to be pronounced. 1865. Norwich v. Attorney-General.

The constitutional doctrine, that one branch of the Legislature is also the executive, makes it all the more clear that the executive ought not to do that which, looking at the act of the Legislature, ought not to be done. Because, to do so would be at variance, in spirit at least, with acts to which the Executive, in another capacity, had been a party.

My opinion, therefore, upon this branch of the case, is against the contention of the counsel who represents the Attorney-General. I think we must look at the whole of the transactions in question as dealings between the province and certain people of the province, or, in more correct legal phraseology, between the Crown and the subject. And I apprehend that any equity upon which an injunction ought to issue to restrain proceedings at law between subject and subject to enforce a legal debt, under the like circumstances, would be a good equity to support the plaintiffs' bill. Judgment.

The old statute of Henry VIII., (a) gives effect to equitable defences to proceedings at the suit of the Crown to enforce Crown debts.

It provides, "that if any person or persons, of whom any such debt or duty is, or at any time hereafter shall be demanded or required, allege, plead, declare or shew, in any of the said courts, good, perfect and sufficient

(a) 33 Hen. viii., ch. 39, sec. 79.

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cause and matter in law, reason *or good conscience*, in bar or discharge of the said debt or duty, or why such person or persons ought not to be charged or chargeable to or with the same; and the same cause or matter so alleged, pleaded, declared or shewed, sufficiently proved in such one of the said courts as he or they shall be impleaded, sued, vexed or troubled for the same, that then the said courts, and every of them, shall have full power and authority to accept, adjudge, and allow the same proof, and wholly and clearly to acquit and discharge all and every person and persons that shall be so impleaded, sued, vexed or troubled for the same."

It has been held that the Crown debtor may proceed by bill to set up his equity against enforcement of the Crown debt. Sir *Thomas Cecil's* case; *Ex parte Colbrooke*, (*a*) and other cases.

Judgment.

With regard to the relative position of the Government, the municipality, and the railway company, I did not, in giving relief in the Court of Chancery, proceed upon the ground that the relation of principal and surety was constituted between them. The plaintiffs' contention is, that the railway company is the principal debtor, the Government the creditor, and the municipality the surety. To constitute this relation the Government must have made the loan to the railway company, and the municipality have been surety to the Government for its re-payment. Looking at the Municipal Loan Fund Act, it appears to me this could not have been the position of the parties. The Government could lend only to the municipality. It is true the money lent could be appropriated to no other purpose than a loan to the railway company, but it was lent to the municipality, in order to enable the municipality to lend it to the railway company. The relation of the parties thereupon being, the municipality debtor to the

(*a*) 7 Price, 100.

Government, and the railway company debtor to the municipality. The position of the parties was somewhat peculiar, but perfectly well understood. It was assumed to be so much the interest of the municipality to have the railway constructed as to make it worth its while to borrow money in order to lend the same money to the railway company: and the Government felt sufficient interest in the prosperity of the country, and more directly in this matter, in the prosperity of the municipality, to lend the money for the advancement of that particular purpose to the municipality: the Government, representing the province, indirectly benefiting the province itself by advancing provincial money for that purpose; at least such was the purpose and object of the advance.

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It is in evidence that the municipality would have benefited greatly by the construction of the railway; and it is to be inferred that the expected benefit was the reason which induced the municipality to borrow the money. It is indeed certain that it must have been, and the concurrence of the municipal council, of the rate-payers, and of the Governor-General, is necessary to obtain it: all must have concurred in the opinion that the object proposed to be accomplished was for the benefit of the municipality before the loan could be sanctioned. The money in question in this case was borrowed in order to its being applied in the construction of the railway, and it was so applied. The purpose was necessarily as well known to the Government as to the municipality.

Judgment.

In what was done afterwards affecting the proposed railway, it was of course in the power of the Legislature to have interfered more directly than it did. It might, for instance, have repealed the act authorizing the construction of the railway. Suppose this had been done while the works for its construction were in

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progress, and after the money lent to the municipality had been transferred to the railway company, and had been expended in the work, surely nothing could be more unreasonable, more utterly inequitable, than for the Government under such circumstances to exact payment from the municipality. I am not supposing an act of wanton wrong done by the Legislature. It might be an act of sound policy in view of the general interests of the Province; and the acts of the Legislature, which have in this case altered the position of the plaintiff, are, it is to be assumed, acts of that character. But, supposing a repeal of the Woodstock and Lake Erie Railway Act under the circumstances I have mentioned, it would hardly be contended, I suppose, that the Government could justly exact payment from the municipality. I think I may assume, that in so strong and clear a case the money could not be exacted; and if this be so, what remains is only a question of degree. Are the acts of the Legislature in relation to this municipality and the railway, in the construction of which it was interested, of such a nature as to make it inequitable in the Executive Government to exact the money.

Judgment.

I thought in the court below, and I still think, that they are. I have said that in my view of the position of the parties, the relation of principal and surety was not constituted: nevertheless the principles upon which equity proceeds in relieving sureties are not altogether inapplicable to the position of these parties. As I understand the law of principal and surety, sureties are not relieved because the debt for which they are answerable is not their own, but the debt of another; to relieve them on that ground would be mere weakness, savouring rather of compassion for their position, than of sound reason. They are relieved from their contract, and the law does not do so serious a thing as relieve a party from the performance of a contract on so untenable a ground as that. They are relieved, as I understand, because the person to whom they are answerable has

altered their position, in relation to the person who is answerable over to them. In dealings between subject and subject the power to do this can very rarely exist, except when the relation of principal and surety exists; and for that reason it is, I apprehend, that we find the law applicable to the case of a party being discharged from liability to answer a debt, by reason of the dealings of third parties, under the head of principal and surety. In speaking of the ground upon which sureties are held to be discharged, I do not forget that the fact of the surety deriving no benefit, and receiving no consideration for his suretyship, is dwelt upon as a reason for holding him only to the letter of his engagement; but still it is because his position to the principal debtor is altered by the creditor, that he is absolved from his liability; and if that be the true reason, as in my humble judgment it is, it must apply in all cases where there are two parties entitled in different interests to receive a debt due from a third party, and that party of the two, who, as between themselves is the creditor, discharges the third party from paying the debt to him, who, as between the two, is answerable to the creditor. To illustrate my meaning, take this case: A. lends B. £100, in order to his lending the same £100 to C., and B. does lend the money to C., and A., then acquits C. of his liability to repay the £100 to B., (I am supposing of course that he has the power to do this.) It would surely be against the commonest principles of justice that A. should still exact payment from B.; and so if A., instead of absolutely acquitting C. of his liability, so dealt with C. as to affect prejudicially the position of B. in relation to C., I can see no reason why the law of principal and surety should not apply.

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Judgment.

If the law of principal and surety can at all apply in this case, then I think the dealing of the Legislature with the railway company has been of such a nature as

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to bring the municipality within the clearest cases of relief, by reason of the position of the surety being prejudiced by the dealing of the creditor with the principal debtor. This is so clear that it would be a waste of time to quote authorities in support of it.

But if the case were entirely outside of the law of principal and surety, there are still equitable principles which apply to it, and which entitle the municipality to relief. It is a rule, that where it would be against equity and good conscience to enforce a legal right, its enforcement will be restrained by injunction; and that is what is in substance sought in this case. The Government is enforcing payment of its debt by summary process given by the statute; in effect, enforcing a legal right; and an injunction to restrain this is asked for. Upon this the question arises, whether it is against equity to enforce this legal right. It is unquestionable that the position of the municipality has been changed, greatly to its detriment, by the acts of the Legislature. I need instance only two or three particulars. The extent and course of the railway have been changed. Shareholders in the railway company have been allowed to retire, and the company thereby rendered less able to meet its engagement to the municipality, the security of the municipality for the payment of this very debt being thereby impaired. The whole property of the railway company has been handed over to another railway company, whereby the security of the municipality has been lost; and what is a stronger instance still, the construction of the railway itself is postponed in favor of a larger scheme, until a remote period and a contingency which may never arise.

Judgment.

Now the equity upon which I thought the municipality entitled to relief was, that the Legislature in the exercise of its paramount authority, did by these acts thwart the purpose for which the money had been lent; that it intervened between the municipality and the

accomplishment of the object for which the municipality became debtor to the Government; that of its own deliberate act it disappointed the purpose for which the municipality incurred the debt; and deprived the municipality of the expected benefit for which alone it was incurred; and that it caused an entire failure of the consideration for the contract: I mean of the consideration in its true sense, which was not the technical one of the receipt of so much money; but the construction of the railway, towards the building of which the money was to be applied.

In all this I suppose no capricious injury inflicted by the Legislature, but acts which, while they did inflict injury upon the municipality, are for the general benefit of the Province. They are however acts of a character which, if they had occurred between subject and subject, would, in my judgment, have raised a clear equity in favor of the party who was injured by them.

I do not know whether it has been determined that the statute of Henry VIII., to which I have referred, is in force in this Province. I apprehend that it is; and that it applies to all debts of the Crown of whatever nature. I understand it to be so put in *Manning's* Practice, on the Revenue Branch, in the Exchequer; (*a*) and this seems to be the case from the authorities to which he refers. But even if not in force here, a Court of Equity ought, I have no doubt, to act in the spirit of the 79th section, and to allow the party charged with a Crown debt to shew "just, perfect and sufficient cause and matter in law, reason or good conscience, in bar or discharge of the debt or duty."

Judgment.

It seems to me inequitable to exact payment of this debt after all that has occurred. The municipality contracted a debt, under certain circumstances, to the Crown, *i.e.*, to the Province; and the Legislature of the

(*a*) Page 101.

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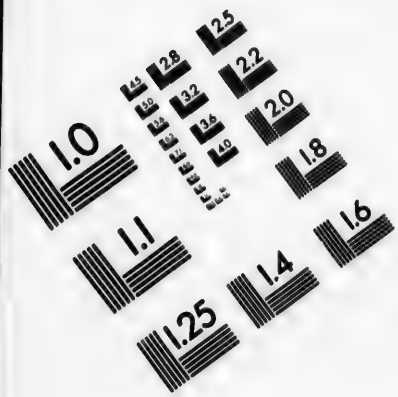

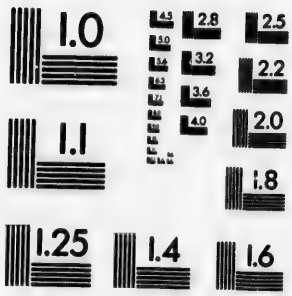

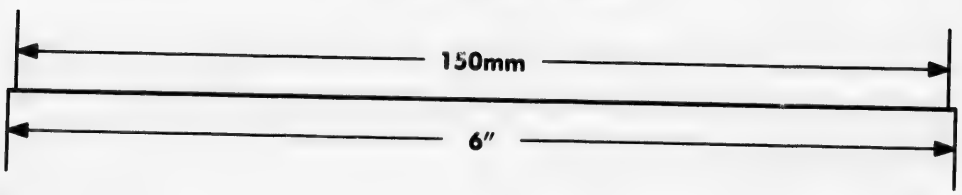

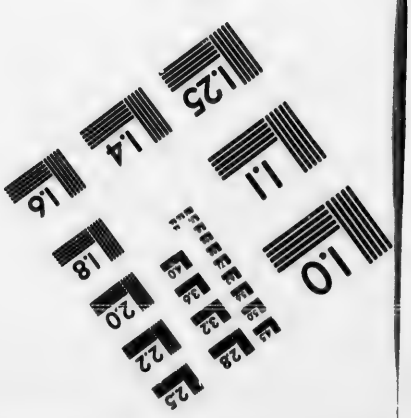

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Province, as an act of public policy, altered the circumstances, to the great disadvantage of the municipality; and the Legislature appears to have felt that it was not just, under the circumstances, to hold the municipality still liable, for it provided, by 22 Vic., 1859, chapter 90, section 27, that the new railway company, incorporated by that act, should assume and pay to the Provincial Government the very debt in question in this suit. No municipality was made to intervene. It was made a debt, direct from the new railway company to the Provincial Government by that name. I should myself read the clause as meaning that the debt should be transferred from the municipality to the new railway company, and this was most just under the circumstances, and particularly in view of the fact that by the same act the whole of the lands and other property of the Woodstock and Lake Erie Company were vested in the new company thereby incorporated; so that the company, against which the municipality had formerly its remedy over for the recovery of this debt, was thereby in effect annihilated. Surely the hand that did this ought not still to exact the debt, and, as I read the act, it was not intended that it should.

Judgment.

But, it is said, we must accept without question the decision of the Legislature. I grant that we must. I admit that a Court of Equity cannot grant relief on the ground that the Legislature has done what is inequitable. I place my judgment upon an entirely distinct ground, viz., upon this, that the Legislature having done what it has done, which I assume to be for the best interests of the Province, has made it inequitable in the Government to exact this debt. If the Legislature had enacted that the debt should still be exacted; or if it were a necessary implication from what it has enacted, that the municipality should still be held liable, there would be no question open for the decision of a Court of Equity; but this is not the case; on the contrary, so far as we have any indication of the mind of the Legislature, it is

the other way, for it creates a new liability in another quarter for the payment of the debt, in substitution, there is reason for contending, of the liability of the municipality. I think it may well be held to have been in substitution; for the necessary consequence of the act of the Legislature was in effect to cancel the bond of the Woodstock and Lake Erie Company to the municipality; and instead of the like remedy being given to the municipality against the new company, the act makes the new company directly liable to the Government; the previous direct liability to the Government, and the only one, was from the municipality; there was none from the Woodstock and Lake Erie Railway Company. By the act the Government obtained a new direct liability, and at the same time cancelled (in effect) the liability of the old company to the municipality. I think it unreasonable to hold that the Legislature could have intended any thing so unjust as to add to its own security (the security held by the Province), and at the same time destroy the only security held by the municipality. This consideration derives additional force from the language of the clause: "The company incorporated by this act shall *assume* and pay to the Provincial Government," &c. The word "assume," in this connection, appears to me to import that the new company should take upon itself the payment of certain debts which had been the debts of the old company, and instead of the old company; the new company in that respect, as in other respects under the act, being made to take the place of the old company. I think that the proper conclusion is, that the new liability to the Government was in substitution of the former one.

Judgment.

The position of the parties appears to be this: The Government by its proper departmental officer, or the proper departmental officer in the name of the Government, is proceeding to enforce this debt; and the municipality files its information against the law officer of the Crown, setting forth certain equities, by reason of which it

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claims that the debt should be held discharged, and that the proceedings to enforce it should not be taken. To this the Attorney-General answers, admitting the acts of the Legislature, upon which the plaintiffs' equity is mainly based; but not admitting that the Crown is responsible for them, or that the plaintiffs are entitled to the relief prayed; and the answer submits that the plaintiffs are not entitled, upon their own shewing, to the relief prayed.

The Attorney-General at the first hearing objected to the jurisdiction of the court, this being a revenue matter; and that objection was sustained. In the order in council subsequently passed it is stated that "the Attorney-General recommends that he be authorized to abandon the privilege of the Crown in respect of its freedom from jurisdiction before the court of Chancery, and so allow the matter to be decided by the court upon its merits." And this recommendation was adopted in council.

Judgment.

I cannot help thinking that if the case is decided, upon the supreme power of the Legislature to do as it pleased, without reference to what ought to be the consequence of the acts of the Legislature upon the municipality and its engagement to the province, a decision upon the merits of the case is intercepted, and the submission to the jurisdiction is simply illusory. When the case was before me in Chancery no such point was raised. The case was argued *upon its merits*, and I dealt with it and decreed relief in it just as if the like case had arisen between subject and subject: and no exception was taken to its being treated in that light. Supposing the Legislature silent as to whether the municipality should remain liable under the altered circumstances which it has created, (and that is, in my view, putting the case most strongly against the municipality), the point for the Court of Chancery to decide was, whether, upon the principles of a court of equity,

the municipality should remain liable. If that point is not open for decision there is not, that I can see, any point at all for the court to decide; and the submission to its jurisdiction was a mere idle form. 1865. Norwich v. Attorney-General.

HAGARTY, J.—I think the municipality has wholly failed to establish the position so ably contended for by their counsel, that they in substance were sureties, and the railway company the principal debtors to the Crown.

The township borrowed the money strictly on the Loan Fund Act, and the amount was debited to them by the Receiver-General, and I do not see how the Crown had any debtor or any claim against any person or corporation for the moneys mentioned in their debentures except the municipality. With the aid thus obtained, and other funds, the railway company commenced the road and spent all its available funds, and became wholly unable to complete the road. This was prior to any interference by the Legislature. Judgment.

All subsequent legislation would seem as so many attempts to resuscitate this broken down enterprise, and if possible save from total loss the amounts already sunk.

It is to be noted that all the municipality money was expended and their debtors, the original company, insolvent before any cause whatever of complaint on the score of Government dealings with the company had arisen.

It must be conceded that the paramount authority of Parliament could continue the liability of the municipality, if it thought proper so to do, although it might have materially affected by its enactments the security relied on by the township for its indemnity.

In a well known case of the *Toronto and Lake Huron*

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Railway Company v. *Crookshank* (*a*), the late President of this court, in speaking of railway companies, said "When the Legislature does pass an act for controlling or regulating their affairs, it becomes, generally speaking, a matter beyond the authority of any court of justice to deny to the provisions, whatever [they] may be, their plain effect, upon any idea, however well founded, that they do not seem reconcilable with either public or private claims. * * * The changes which the act authorizes are indeed so extensive, that it would scarcely be a greater alteration of the original design if the railroad stock had been allowed upon the prayer of the petitioners to be changed into canal stock."

The first grave reason urged for discharging the municipality, is the effect of the statute of 1856 (*b*), which permits existing stockholders to retire. But the preamble of this act expressly states that this municipality is interested in the railway company, and contemplated converting its bonds into stock, and declares that this may be done. It seems clear to me that this act leaves the debt due by the township to the Government or the loan fund untouched.

Judgment.

Then came the amalgamation agreement between the old company and the Amherstburg company, postponing the construction of the part of the road in which Norwich was chiefly, if not solely, interested, falsely, as respondents assert, stating that the municipalities had agreed to this course, and contracting that the new company should assume and pay to the Provincial Government the loans made by the municipalities to the railway, and the act passed in the same year expressly confirms the deed of amalgamation (*c*). In its 21st section it amends a clause in the original charter of the Woodstock and Lake Erie Road Company; and finally, by statute of 1859(*d*), the preceding acts were repealed

(*a*) 4 U C Q. B. 316.
(*b*) 19 Victoria, chapter 74.
(*c*) 22 Vic., ch. 118.
(*d*) 22 Vic., ch. 90.

and a new company formed: certain subscriptions for stock in the Woodstock and Lake Erie Company and the Amherstburg Company were held as stock taken under this act; all the assets of the Woodstock and Lake Erie Company were transferred to this new company, which was to discharge the liabilities of the former company; and, by section 27, the new company should assume and pay to the Provincial Government the moneys loaned by Norwich and the other municipalities to the late Woodstock and Lake Erie Railway Company. 1865. Norwich v. Attorney-General.

Now these last acts, so far from discharging the municipalities from their debts to the loan fund, expressly recognise their existence, and direct that the company substituted by the Legislature for the old company should assume and pay the debt. We must take it as clear, that the Legislature was aware that the old company had agreed to pay to the municipality the same amount it had to pay to the loan fund. The municipality held the old company's bond; the Legislature knowing this, as it was destroying the old company, the obligors in that bond, directs that the substituted company shall substantially assume and pay this debt to the Government. Had the words been that the new company should give its bond to the municipality to the same effect as the old company's bond, the matter would have no doubt been clearer, but the substance is the same. I do not think that we have any right to hold that because the Legislature has thought proper to direct that a company which might or might not, according to its financial success, ever go into operation, should assume and pay that debt to the Government, that therefore the original debtor was discharged. One party assuming the debt of another, does not, I think, *ex vi termini*, release the other from the liability. Judgment.

I think the fallacy of the municipality's argument lies in asking us to look upon the action of the Legisla-

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tive power as exactly similar to the action of the Crown as one of the three estates. It may be quite true that the Crown may so deal with parties indebted to it as to raise equities against enforcing the claim, because in such case the Crown's dealings with its debtors may be controlled by the operation of existing law, at least when no objection is raised as to jurisdiction. But when the paramount authority of the law making power interposes and does similar acts, this court cannot inquire whether such have or have not a prejudicial effect on the debtors, or whether the law of the land does or does not sanction such a dealing, so long as that supreme power chooses to treat and hold the debtor as still liable. The only question open to the court would be, as it seems to me, whether the Legislature have by its express declaration or by necessary intendment, according to the rules for construing statutes, put an end to this liability. I think that up to and in the last statute, the liability is expressly treated as existing, and thus the whole question is narrowed down to one point, viz., by directing the new company to assume and pay the municipality debt to the loan fund, is the municipality released from its obligation therefor?

Judgment.

I think it is not so released, and that the decree of the court below must be reversed.

Per Curiam.—Appeal allowed, and the bill in the court below dismissed with costs. [SPRAGGE, V. C., dissenting.]

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HALL v. HILL.

Sale for taxes—Treasurer's warrant.

Held, affirming the judgment of the court below, that the provision of the statute 16 Vic., ch. 182, secs. 55 and 56, Con. Stat. of Upper Canada, chap. 55, requiring the county treasurer in the warrant issued by him for the sale of lands in arrear for taxes, to distinguish those that have been patented, from those under lease or license of occupation, is compulsory; and that sales effected under a warrant omitting such particulars are void.

The action in the court below was, as stated in the special case, one of ejectment for the west half of lot No. 10, in the thirteenth concession of Emily.

The plaintiff claimed under a sheriff's deed for taxes, dated the 19th of December, 1855, made by *Wilson S. Conger*, then sheriff, to the plaintiff.

The trial took place at Peterborough, in April, 1863, before the Hon. Mr. Justice *Hagarty*. Statement.

Letters patent for the land in question had been issued, dated the 8th of February, 1838, granting the same in fee. It was proved at the trial that the land in question was in arrears for taxes for six years before the issue of the warrant to sell, which bore date the 7th of August, 1854, and was issued by the treasurer of the county in which the land in question was situate to the sheriff of the same county, commanding him to levy upon the land for the arrears due thereon, with his costs.

The warrant and advertisement thereon did not distinguish between lands granted in fee and those which were under a lease or license of occupation, and the fee whereof remained in the Crown. The land in question was advertised by the sheriff and sold by him at public sale, the plaintiff becoming the purchaser thereof. The notice of sale was dated the 9th of

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August, 1854, and first appeared in the *Canada Gazette* on the 19th of August, 1854; it was also in the *Canada Gazette* of the 11th of November, 1854, which was apparently the last advertisement. This advertisement was not inserted in the local paper; the sale was advertised for the 26th of November, 1854, but this lot was sold at an adjourned sale on the 4th of December; the sheriff signed the usual certificate of sale to plaintiff, and the land not having been redeemed he executed the conveyance of the lot to the plaintiff.

For the defence, it was objected that there was no evidence that the taxes were in arrear, and that neither the warrant nor advertisement distinguished between lands patented in fee or under lease, or license of occupation. The objections were overruled, but leave was reserved to move on the first point.

Statement.

Plaintiff had a verdict.

Defendant afterwards obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection in regard to the sufficiency of the advertisement of sale.

The court made the rule absolute for a new trial, with costs to abide the event.

From this judgment the plaintiff appealed for the following amongst other reasons.

That the judgment of the court was erroneous, in holding that the statute of the Parliament of Canada, 16 Victoria, chapter 182, section 56, is, as regards the requiremonts of the 56th section, mandatory and imperative.

That the appellant in this cause, having purchased the land in question in this suit at a sale thereof for

taxes, such taxes having been more than five years in arrear, which was duly proved at the trial of the cause, and having obtained a deed thereof from the sheriff, was entitled to recover possession of the land in such action, notwithstanding the warrant of the treasurer for the sale of said land did not distinguish lands which had been granted in fee from those which were under lease or license of occupation. 1865. Hall v. Hill.

That the land before the sale thereof had been duly advertised, as required by law.

That whether or not, the appellant, as purchaser, was not affected by any irregularity in the mode of advertisement.

The respondent submitted that the judgment of the Court of Queen's Bench was correct, and should be sustained.

Statement.

The case in the court below is reported in 22 U. C. Q. B. 578, where the facts are fully set forth.

Mr. *R. A. Harrison* and Mr. *J. Boyd* for the appellant.

Mr. *S. J. Vankoughnet* for respondent.

For the appellant it was contended that at the most the warrant of the treasurer was only an irregular proceeding; it could not be deemed a void one. There was no evidence shewing that any of the lands directed to be sold were unpatented, the presumption therefore would be that all those directed to be sold were lands for which the patents had issued. That to effect a valid sale of lands it was essential to show only that the lands were taxable; that the taxes rated were in arrear, and that the sheriff had a warrant to sell, and which, if even held irregular, would not have the effect of vitiating

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sales made under it.—*Morgan* v. *Parry* (*a*), *Gouse* v. *Hannon* (*b*), *Allan* v. *Fisher* (*c*), *Doe* [illegible]*msley* v. *McKenzie* (*d*), *Doe Greenshields* v. *Garrow* (*e*), *Doe Burnham* v. *Simmonds* (*f*), *The Attorney-General* v. *Sillem* (*g*), *Perry* v. *Powell* (*h*), *Doe Spafford* v. *Brown* (*i*), were, with other cases, referred to.

For the respondent it was submitted that the effect of the statute was to make the municipalities, not the individual proprietors, the sufferers by any informality in the proceedings to enforce payment of the taxes; here the loss must in the first instance fall on the appellant, his recourse being against the municipality. *Jarvis* v. *Cayley* (*j*), *Harbourn* v. *Boushey* (*k*), were referred to and commented on.

Judgment.

VANKOUGHNET, C.—The judgment of the court below should, I think, be affirmed. The treasurer's warrant is the foundation of the subsequent proceedings, irregularities in which, where they have occurred in acts merely ministerial or executive, the courts have gone a long way to excuse; but we cannot throw aside every provision of the statute, and permit men's properties to be sold after any fashion which the officers charged with the duties of enforcing payment of taxes may choose to devise. I look upon the act of the treasurer, in determining what lands are in arrear for taxes and liable to sale, as a *quasi* judicial act, and one which must be performed in accordance with the provisions of the statute. His warrant declares what lands are liable to sale, and this it must do in the way which the statute prescribes.

(*a*) 17 C. B. 334.
(*b*) 14 U. C. C. P. 26.
(*c*) 13 U. C. C. P. 63.
(*d*) 9 U. C. Q. B. 559.
(*e*) 5 U. C. Q. B. 237.
(*f*) 9 U. C. Q. B. 436.
(*g*) 10 Jur. N. S. 263.
(*h*) 8 U. C. Q. B. 251.
(*i*) 3 U. C Q. B. O. S. 90.
(*j*) 11 U. C. Q. B. 282.
(*k*) 7 U. C. C. P. 464.

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RICHARDS, C. J.—The case turns upon the question whether it is essential to the validity of a sale of lands for taxes, that the county treasurer in the warrant to be issued by him under the Provincial Statute 16 Victoria, ch. 182, sections 55 and 56, in effect the same as Consolidated Statutes of Upper Canada, chapter 55, sections 124 and 125, should distinguish the lands that have been patented from those which are under lease or license of occupation, and of which the fee still remains in the Crown. If this provision be compulsory, then the judgment of the court below is correct; if directory only, then it is wrong, and ought to be reversed.

On the best consideration I have been able to give this subject, I think the proceeding required is compulsory. No doubt some of the cases which are decided on the point as to what provisions in statutes are mandatory and what are directory, would seem to lay down the rule in terms broad enough to sustain the plaintiff's case. But it must not be overlooked that the courts have presented to their minds the peculiar circumstances of each case, and have applied and acted on the well known rules of interpretation of statutes, which would aid in arriving at just conclusions. Thus, when the essential part of the statute was that a certain thing should be done, and in the enactment it was stated it should be done on a certain day, it has been held that it might be done after that day, when it would cause no injury to any one by its being done after the day, and when the statute did not in terms prohibit its being done after that day. The case of *The King* v. *The Inhabitants of Birmingham* (*a*), so often referred to as being one of the strongest cases where the words of an act of parliament apparently shewed that it was intended to be compulsory, and it was held to be directory, arose under the Imperial Statute 4 George IV., cap. 75, sec. 16, by which it was provided that the father of any

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(*a*) 8 B. & C. 29.

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party under twenty-one years of age, should have authority to give consent to the marriage of such party, and "*such consent is hereby required* for the marriage of such party." In giving judgment Lord *Tenterden* said, the language of this section is merely to require consent, it does not proceed to make the marriage void without it. He also referred to a provision in the 16th section, that if any such marriage shall be procured by a party to the marriage when either of the parties are under age, *not* that the marriage shall be void, but that all the property accruing from it shall be forfeited, and adds, "this is the penalty for disobeying the direction of the Legislature given in the sixteenth section."

But in relation to legal enactments on the subject of making marriages void the clearest words are required for that purpose. In *Catteral* v. *Sweetman* (*a*), Dr. *Lushington* said, "There never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity, unless such nullity was declared in the act; and that viewing the successive marriage acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the Legislature to create a nullity, and that this is the Legislative interpretation of the acts relating to marriage." In this view, the case of the *King* v. *The Inhabitants of Birmingham*, will not be viewed as so decided an authority in determining what are directory provisions in statutes as it might otherwise be considered to be.

Judgment.

The courts in this country have always held that the imposition of taxes on wild lands, and the selling those lands for the arrears of such taxes, with the additions and accumulations to the amount of taxes which these acts require, in effect works a forfeiture of the property of the owner of the lands. In relation to statutes of this class *Turner*, L. J., in *Hughes* v.

(*a*) 9 Jurist, at p. 954.

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Chester and Holyhead Railway (*a*), says, "This is an act which interferes with private rights and private interests, and ought therefore, according to all the decisions on the subject, to receive a strict construction so far as those rights and interests are concerned. This is so clearly the doctrine of the court, that it is unnecessary to refer to cases upon the point; they might be cited almost without end."

In *Morgan*, appellant, and *Parry*, respondent (*b*), most of the authorities, as to what are mandatory and what are merely directory proceedings in acts of parliament, are referred to and discussed. The consideration of the thirteenth part of the 101st section of 6 & 7 Victoria, ch. 18, was before the court: it provided that the overseers of every parish, &c., "*shall*, on or before the first day of July in each year, make out a voters' list, and the said overseers *shall* sign such lists." And by section 35 they are required to deliver the lists by them made to the revising barrister, and the question was, whether a list duly made by the overseers, and delivered to the revising barrister, but not signed, was to be treated as a valid list or as a nullity. If the 13th section was imperative, the list might be held altogether void if not signed, but if it was only directory, then, although the overseers might have neglected their duty and be liable to punishment, the list might be revised by the barrister.

Judgment.

The Chief Justice, after considering what the object was in furnishing the lists, and the reason why they should be signed, concluded that the Legislature did not intend the whole proceeding should be void from the omission of signature, and the court came to the conclusion that this section of the statute was to be considered directory only.

(*a*) 7 Law Times, N. S. 203.

(*b*) 17 C. B. 334

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Hunt v. *Hibbs* (*a*), was an action for a penalty aginst an overseer for not making out the Burgess roll before the first of September, which, under the statutes in relation to the subject, was required to be made out on or before that day. The defendant pleaded that the roll was made out and delivered by the 5th September. On demurrer, it was argued, on behalf of the defendant, that the statute was only directory, and that he was not liable for the penalty. The court held he was liable. *Channell B.* said, "it is urged that the enactment is directory only, but the very object of it is to fix the precise time." *Chapman* v. *Milvain* (*b*), was an action by the plaintiffs on a covenant, made with them by name, contained in the deed of co-partnership of a joint stock banking company, by the defendant, as a subscriber, to pay the different calls. The defendant pleaded that the banking company was a co-partnership for carrying on the business of bankers according to 7 Geo. IV., ch. 46, and there were public officers of the co-partnership according to the statute; and that the money sought to be recovered in the action was a debt due to the co-partnership and relating to the concerns of the same. The plea was demurred to on the ground that under section nine of the act the action must be brought in the name of the public officer. The section was to the effect, that all actions against any person who may be at any time indebted to such co-partnership, and all proceedings at law or in equity to be commenced or instituted, for or on behalf of such co-partnership, against any person or persons, whether members of the corporation or otherwise, for recovering any debts, or enforcing any claims or demands due such co-partnership, or for any other matter relating to the concerns of such co-partnership, *shall, and lawfully may* be commenced, or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid, for the time being of such co-partnership, as the nominal

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(*a*) 5 H. & N. 123. (*b*) 5 Ex. 61.

plaintiff on behalf of such co-partnership. The section also provides that all actions against the corporation shall be brought against the public officer, and in indictments, &c., the public officer may be alleged to be the owner of any goods, chattels, &c., of the corporation, that may be stolen.

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In discussing the question, Baron *Parke* considered the inconvenience that would result in having the action brought in the name of any one but the public officer of the company, both as to costs in the event of the suit failing, and the set-off by the defendant, if the corporation was indebted to him; and he came to the conclusion that the inconvenience afforded an additional ground for construing the words, which were *primâ facie* obligatory, in the usual sense, and he concluded his judgment as follows: "Upon the whole, we think the words *shall and lawfully may*, are obligatory, and ought so to be construed in this case."

Judgment.

In deciding what the intention of the Legislature was in reference to the matter before us, we must not only look to the statute itself, but to the other statutes that have been passed on the subject, repealed and unrepealed.

The words of the 55th section are in effect, that whenever any portion of the tax on any land has been due for five years, the treasurer *shall issue* his warrant, under his hand and seal, directed to the sheriff of the county, commanding him to levy upon the said lands *for the amount of arrears due* thereon, with costs; and the 56th section, as before mentioned, enacts, that the treasurer in the warrant shall distinguish such lands as have been patented from those which are under lease or license of occupation. The sheriff has no means of knowing if a lot put up for sale has been patented or not, and can give no information to intending purchasers if it is not given in the warrant. The conse-

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quence may be that the whole of a patented lot may be sold to pay a small amount of taxes, because the purchaser may be under the impression that it is merely under lease or license of occupation, and that the fee is in the Crown, and that he can only acquire by the purchase the same rights as the original locatee or purchaser had. Or, supposing the sheriff proceeds to sell a lot under the section, and sells it as a patented lot, what remedy has the purchaser if it should turn out to be but a leased lot, or one held under a license of occupation, and if he could get no redress, and I do not at present see how he could, would that not induce him to look on every lot sold as one that the fee was in the Crown, and so work injustice to the owners by sacrificing the property because the treasurer had failed to do that which the law said he should do.

Judgment.

The 22nd section, 6 Geo. IV., ch. 7, declared that no omision of any direction contained in the act relative to notices or forms of proceeding previous to any sale made under that act, should extend to render such sale invalid, but the person guilty of any such omission or neglect should be liable to punishment therefor, and should answer to the party for any damages occasioned thereby in any legal proceeding that might be properly instituted for that purpose. This provision to cover omissions or irregularities, and to give a right of action to any one who suffered damages from the neglect or misconduct of the officer, was dropped in the act of 1850, and has not been introduced into any of the statutes on this subject passed since. An inference may be drawn from this omission that the Legislature did not intend to cure irregularities, particularly those of a character that might seriously affect the interest of the owner of the property. The statute of 1853 made no further provision on this subject than is contained in the act of 1850, and I am not aware that there is any legislation on that particular point subsequent to the act of 1853, until the passing of the Provincial Statute 22 Victoria. ch. 19.

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By the fourth section of that act it is provided, "that the treasurer and sheriff of every county shall not be required to inquire, before sale of land for taxes, whether there is any distress upon the land; nor shall they be bound to inquire into or form any opinion of the value of the land; and if any taxes in respect to any lands sold by the sheriff after the passing of the act shall have been in arrears for five years, as in the first section of that act mentioned, preceding the first day of January, in the year in which the sheriff shall sell the said land, and the same shall not be redeemed in one year after the said sale, such sale, and the sheriff's deed to the purchaser of any such lands, (provided the said sale shall be openly and fairly conducted,) shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through, or under them."

Judgment.

The intention of this section would seem to be as to all future sales, when any of the taxes were in arrear for five years, with a sale fairly and openly conducted, if the land is not redeemed within the year, and is conveyed to the purchaser, that the purchaser shall then hold the land, though there may be irregularities; the law under this amendment, making the arrears of taxes for five years, and a fair sale by the sheriff, the essential requisites to a good sale.

Looking then at the course of legislation on the subject, the injustice that might arise from the omission of the requirements of the statute as to distinguishing the land patented from that held under lease, &c., and the absence of any provision indemnifying those who may suffer from that omission, I think the conclusion arrived at in the court below, was the correct one under the statute of 16 Victoria, ch. 182, under which the lands claimed by the plaintiff were sold. The appeal must therefore be dismissed with costs.

Per Curiam—Appeal dismissed with costs.

1865.

REID v. WHITEHEAD.

Registration.

...d, reversing the judgment of the court below, that when the memorial follows the description, which in the deed itself is sufficient, registration thereof is effectual.

The decree appealed against is reported in the 10th volume of *Grant's* Chancery Reports, page 446, where the facts out of which the suit arose sufficiently appear.

Statement.

From that decree the defendants, *The Canada Life Assurance Company*, appealed; assigning as grounds: That the evidence taken in the cause sufficiently established actual notice to the respondent of the mortgage made by *Pomeroy*, of which the appellants are the assignees; that the assignment of the appellant's mortgage, and the memorial thereof, and affidavit of execution, sufficiently comply with the requirements of the Registry Laws of Upper Canada, and the registration thereof, is, in every respect, sufficient, and constitutes notice of the instrument, and its contents, to all persons claiming any interest in the lands embraced in the mortgage subsequent to its registry, the same having been so registered prior to the making or registration of the plaintiff's mortgage; that the due registration of the said assignment, the mortgagor being a party thereto, is a sufficient registration of the appellant's mortgage, or is itself a sufficiently registered mortgage of the lands therein comprised, within the spirit and meaning of the Registry Laws of Upper Canada, and that the memorial of the assignment complies with the requirements of the Registry Acts, as respects the descriptions of the lands, and conforms thereto in every particular, inasmuch as it mentions the lands contained in the instrument of

which it is a memorial, and the city where the same are situate, in the manner in which the same are described in said instrument, or to the same effect, which is all that the Registry Acts require; that the description contained in the said instrument is sufficiently certain to pass the property, and the said instrument, being good as a conveyance, the requirements of the act are sufficiently complied with by importing into the memorial the description, in the same words as it is contained in the deed; and there is no obligation imposed by the acts to define upon the registry books the particular portion of a lot intended to be conveyed—such description, being, by reference to a plan or survey, or otherwise, sufficiently certain to pass the property—and the registry in this case was a sufficient registry within the acts.

1865.

Reid v. Whitehead.

In support of the decree appealed against the plaintiff assigned as reasons: that it did not appear that the plaintiff had actual, or any, notice of the mortgage to *Bray* when he took his own; that the mortgage to *Bray* was not registered, if at all, until after the registration of the mortgage of plaintiff, and became and was fraudulent and void as against it; that the mortgage to *Bray* being so fraudulent and void, the assignment thereof to the appellants was inoperative and void as against the plaintiff; that the registration of the assignment, if there were a valid registration thereof, could not, nor did the same revive or validate the said mortgage, or affect the plaintiff with notice of the same; that there was not any registration of such assignment within the statutes in that behalf; that the pretended registration of the assignment was defective and void, for the reasons, and in the particulars, stated in the bill, and in the judgments in Chancery, and particularly because the description of the lands in the pretended memorial thereof is not sufficient, nor is the said description the same, or to the same effect, as that

Statement.

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comprised in the said assignment; and he submitted that should the decree be varied, as prayed, yet the appellants were not entitled to be paid, in respect of the said mortgage, more than the amount by them paid on the assignment thereof, for the reasons in the bill in that behalf stated.

Mr. *Strong*, Q. C., and Mr. *Burton*, Q. C., for the appeal.

Mr. *Blake*, Q. C., and Mr. *Wells*, contra.

Gardiner v. *Blesinton* (*a*), *Dillon* v. *Costello* (*b*), *Gubbins* v. *Gubbins* (*c*), *Hunter* v. *Kennedy* (*d*), *Honeycomb* v. *Waldron* (*e*), *Llewellyn* v. *Earl Jersey* (*f*), *The Queen* v. *The Registrars of Middlesex* (*g*), *Sugden* on Vendors and Purchasers (*h*), were, with other authorities, referred to.

Judgment.

Counsel for the apellants conceded that the only sum they could claim was the amount paid by the company for the mortgage.

VANKOUGHNET, C.—A reconsideration of this case has led me to the conclusion that the decree in the court below was wrong. Three questions did not sufficiently engage attention there. The first is, whether or not the assignment of the mortgage was in itself a conveyance capable of passing the interest which the mortgagee

(*a*) 1 Ir. Ch. N. S. 79.
(*b*) Referred to in Jones Ex. [R. 410.
(*c*) 1 Dru. & Wal. 160.
(*d*) 1 Ir. Ch. 148.
(*e*) 2 Str. 1064.
(*f*) 11 M. & W. 183.
(*g*) 15 Q. B. 976.
(*h*) 11 Ed., p. 973.

took, under the mortgage, in the land covered by it. I cannot say it was not. A reference in one deed to a description of land appearing in some other deed or paper, may be rendered sufficiently certain on the production of the latter. If this cannot be produced, the grantee may be unable to make out his title; but this is a risk more or less common to all documents. A party desiring to deal with any portion of the land which may be affected by a description so given, must, I suppose, satisfy himself by inquiring what that description does cover, or he will run the risk of it; as, on the other hand, the owner of the land may find difficulty in disposing of his property when the description which he gives in a deed relating to a portion of it is not patent or easily ascertained. The second question is, whether the deed being operative, a registration of it by a memorial following the language of the deed is sufficient. I think we must say that it is. The third question is, whether this being so, the mortgage, which has been assigned, is by virtue of the registration of the assignment itself on registry. If the mortgagor himself had not been a party to the deed of assignment I should have said no.—*Honeycomb* v. *Waldron* (*a*). But, on looking at this deed of assignment, we find that the mortgagor is a party to it; that it recites the execution by him of the mortgage, and contains words of grant which, in a court of equity at all events, would be sufficient to charge the estate. As party of the third part to this deed, he "releases and confirms the land," &c., to the party of the second part. It is objected that he did not execute the memorial. This is of no consequence; for the grantee named in the mortgage or deed of assignment might have executed the memorial, and thus effected registration. Here, the assignor of the mortgage, one of the granting parties, makes the memorial which recites the execution of the deed by the original mortgago-

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Reid v. Whitehead.

Judgment.

(*a*) 2 Str., 1064.

1865.

Reid v. Whitehead.

We think, therefore, that the decree of the court below must be so far reversed as to give the mortgage assigned to the *Canada Life Assurance Company* precedence over the plaintiff's mortgage.

Judgment.

HAGARTY, J.—Although a party is not bound to go beyond the four corners of the deed, for the purpose of preparing a memorial for the registration of such conveyance, his Lordship still thought he might do so, in order to give a more definite description of the property, as in practice was frequently done.

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TO THE

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AGREEMENT.

(TO ACCEPT WORK AFTER INSPECTION.)

Two incorporated trading companies agreed by writing under their corporate seals, that certain works which were to be constructed by one for the other, should, on completion, be inspected by engineers to be chosen by the companies respectively, and if reported as completed, the works were to be accepted by the party for whom they were done, who from thenceforth should be debarred from denying or contesting the due and proper execution and acceptance of the works. After the works were alleged to have been completed, the parties who performed the same notified the others thereof, calling upon them to appoint an engineer, which was not done, and subsequently a portion of the works having been destroyed, a bill was filed to compel the parties so neglecting to accept the works. The court below (*VanKoughnet*, C., *dubitante*), considering that the delay which had occurred in naming an engineer, according to the terms of the agreement, ought not to preclude the parties from obtaining an inspection of the works, made a decree in favour of the plaintiffs, but under the circumstances directed a reference to the master for the purpose of inquiring and reporting as to the due performance of the

works. On appeal, this decree was reversed, and the bill in the court below ordered to be dismissed with costs, (*Esten*, V. C., dissenting.)

The Desjardins Canal Company v. The Great Western Railway Company, 330.

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See "Specific Performance," 2.

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See "Practice," 4.

ASSIGNMENT.

(FOR BENEFIT OF CREDITORS.)

1. Where a debtor had, before the passing of the statute 22 Vic., ch. 96, assigned and surrendered his estate and effects to trustees for the satisfaction of his debts without reserve, *held*, affirming the judgment of the Court of Common Pleas, that he might, under the then state of the law, stipulate for the payment of some of his creditors in full, and a ratable distribution as to the rest; and also, for a release to himself from all further liability. [*Esten* and *Spragge*, V. CC., dissenting] *Held* also, that such release may still be insisted upon without any reference to the amount of the dividend to be paid by his estate.

Bank of Toronto v. Eccles, 53.

2. A testator by his will gave all his estate, real and personal, to his executors in trust, empowering them at the same time to continue the business which he had carried on in his lifetime, which they accordingly did for several years, and in the course of so carrying on the business had acquired a large amount of property, and subsequently assigned the same, as

well that portion remaining on hand left by the testator (about one-ninth) as that acquired since his death, to certain trustees for the benefit of all creditors of the estate, and each executor severally assigned for the benefit of individual creditors; the persons named as trustees took and continued in the possession of the chattels assigned under the several conveyances. The trusts declared were for the benefit *pari passu* of creditors coming in, and who were not bound to release their claims. A judgment having been recovered against the executors individually, upon a note made by them as executors, the judgment creditors claimed a right to seize the goods in the hands of the trustees, notwithstanding the assignments thereof. In an interpleader suit brought to try the question, the court below determined that the assignments were sufficient to pass, and did pass the property to the trustees, who were therefore entitled as plaintiffs in such interpleader suit to a verdict; and that the judgment creditors were entitled, if their judgment and execution were against the executors, to claim as creditors upon the estate assigned by them as such, and if necessary, on the separate estate of each, the joint estate being exhausted. On appeal to this court the judgment of the court below was affirmed, and the appeal dismissed with costs.

Kerr v. Haldan, 382.

ATTORNEY AND CLIENT.

An attorney in the prosecution of suits to recover an estate for the heir at-law, who is supposed to be A., buys in a paramount title for the heir-at-law, and subsequently conveys the estate to A., the supposed heir, who sells and conveys to divers purchasers. On a bill filed by B., the real heir, against the attorney and A., and the purchasers from them, the court—in this respect affirming the decree below, as reported in 6 Grant, p. 306—adjudged them to be trustees for B., although it appeared that the ancestor had long before his death conveyed away all his interest in the lands for value—[*Sir J. B. Robinson*, Bart., C. J., dissenting,]—but some of such purchasers having had a prior or better equity than the plaintiff, the court—varying the decree of the court below in this respect—directed that they should not be disturbed although they got in the legal estate with constructive notice of the opposing claim; [*Esten*, V. C., dissenting,] and also varied the decree as to the other purchasers, by directing that under the circumstances the account of rents and profits against them should be limited to commence from the filing of the bill, and that they should be allowed the fair value of all substantial repairs and permanent improvements made by them prior to that date.—[*Esten*, V. C., *dubitante.*]

Henderson v. Graves, 9.

BILL OF EXCHANGE.

(JOINT ACTION ON.)

See "Joint Action,"

BIRTH OF CHILD.

See "Seduction."

BOUNDARY.

(QUESTION OF.)

Held, per Curiam.—Affirming the judgment of the court below, that in an action of ejectment the question of boundary may be tried to ascertain whether the land in question formed part of the lot claimed by the plaintiff. [*Draper* C. J., and *Morrison* J., dissenting.]

Sexton v. Paxton, 219.

CHANCERY ACT—11th clause of.

(APPLICATION OF.)

See "Mortgage," &c., 4.

CHATTEL MORTGAGE.

See "Mortgage," &c., 3.

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COLLATERAL SECURITY.

See "Defence at Law," 2.

CONDITIONAL DEVISE.

See "Will."

CONSTRUCTIVE NOTICE.

The doctrine of constructive notice, and the defence of purchase for value, as applicable to this country, commented on.

Smith v. Graves, 9.

CONVEYANCE.

(ABSOLUTE IN FORM, MORTGAGE CREATED BY.)

See "Mortgage," &c., 4, 5.

CORPORATIONS.

In an action for money lent, brought by the Commercial Bank of Canada against the Great Western Railway Company of Canada, it appeared that the amount set forth in the particulars, being the sum of $942,672 03, was advanced by the bank on the credit of the Great Western Railway Company, and expended by Messrs. *Brydges* and *Reynolds*, the managing and financial directors respectively of the Great Western Railway Company, on the completion and equipment of the Detroit and Milwaukee Railway, which came under the control of the directors of the Great Western Railway Company.

At a general meeting of the proprietors of the Great Western Railway Company held in London on the 1st of October, 1857, and in Canada on the 2nd of November following, it was resolved to advance £150,000 sterling to the Detroit and Milwaukee Company, the expenditure being under the control of the Great Western Company; and at another general meeting of the proprietors of the Great Western Company held in London on the 7th of October, and in Canada on the 2nd of November, 1858, it was resolved to advance the further sum of £100,000 sterling to the Detroit and Milwaukee Company, such advance also "*to be expended by and under the control of the Great Western Directors.*" On the 16th of August, 1858, the statute 22 Victoria, chapter 116, was passed, and by section 11, the Great Western Company was authorized "*to use its funds by way of loan or otherwise, in providing proper connections and in promoting its traffic with railways in the United States of America;*" such expenditure, it was provided, should be authorized by a two-thirds vote of the shareholders at a general meeting; and by that section it was further enacted, "*that the loan of* $750,000 *already made by the said Company to the Detroit and Milwaukee Railway Company is hereby declared to be lawful.*" It appeared that Messrs. *Brydges* and *Reynolds* stipulated with the bank to discharge all advances made by it from time to time on the account in question, by sterling bills of exchange on the Great Western Railway Company, London, or from the traffic receipts of the Detroit and Milwaukee Railway under their control, and credits appeared in the particulars for £88,620 16s. 7d. of sterling exchange (equal to about $515,000) drawn under this stipulation. At the trial, a nonsuit was moved for upon the grounds, amongst others, that these dealings were *ultra vires* of the Great Western Com-

pany ; that *Brydges* and *Reynolds* had no authority to bind the company; and that there was no corporate seal to make defendants liable. Leave was reserved to move the court in *Banc* thereon, and after evidence for the defence, the learned judge (*Burns*, J) left the following questions to the jury :

Firstly—To which company was the credit given by the bank, to the Great Western or to the Detroit and Milwaukee? or was the credit given upon the responsibility of Messrs. *Brydges* and *Reynolds*, irrespective of either company?

Secondly—Had Messrs. *Brydges* and *Reynolds* authority from the Great Western Railway Company to make financial arrangements for the Detroit and Milwaukee Company on account of the Great Western Railway Company to the extent of £250,000 sterling, agreed to be loaned by the Great Western Company to the Detroit and Milwaukee Company? And was the account of the Commercial Bank opened and conducted by them in pursuance of such authority?

Thirdly—Had the Commercial Bank notice at any time, while the account was going on, that Messrs. *Brydges* and *Reynolds* had exceeded their authority, or that more than the two loans, amounting to £250,000, had been expended?

Fourthly—Suppose the original credit was given by the bank to the Great Western Railway Company on the opening of the account, was there any understood limitation between the parties as to the question of liablity at the time the letter of the 16th of December, 1858, was given, either to the extent of the second loan of £100,000 sterling or otherwise? or was the account continued on after that period in the same manner as before by the parties?

Fifthly and lastly—Did the Great Western Company, by its dealings with the Detroit and Milwaukee Company, reap the benefit of the expenditure made by the Commercial Bank on the Detroit and Milwaukee account?

The jury returned the following answers to the questions submitted ;

First—To the Great Western.

Second—They had the authority; and the account was opened and conducted by them in pursuance of that authority?

Third—The bank had no notice that Messrs. *Brydges* and *Reynolds* exceeded their authority.

Fourth—There was no limitation, and the account was continued in the same manner as before the letter of the 16th December, 1858, was given.

Fifth—They did.

A verdict was accordingly entered for the Bank, the amount

to be ascertained by a referee to be agreed on between the parties, who by an indorsement on the record was to have power to report upon the different classes of the account, and to submit a statement for the opinion of the court. A rule *nisi* was obtained by the Great Western Company in the Court of Queen's Bench to enter a nonsuit, and also to set aside the verdict for misdirection and for non-direction; and for the reception of improper evidence as specially set forth in the rule. The Court of Queen's Bench discharged that rule, and on leave given an appeal was brought from that decision. *Held*, on appeal, that the nonsuit was properly refused; and that the Bank was entitled to recover to the extent of so much of the two loans of £150,000 and £100,000 sterling respectively, as had not been drawn for; (*VanKoughnet*, C., *dubitante* as to latter loan;) that the Court of Queen's Bench should have so declared the liability of the Great Western Company to the Bank, and that not having done this there should be a new trial unless the parties settled upon this footing or ascertained the amount by a reference: (*McLean*, President, dissenting;) the court being reminded that the parties at the trial had agreed to a reference of the amount, on consultation, ultimately ruled that if a new trial was desired by the Bank it should be without costs; if by the company then with costs: but if both parties consented, the case should be remitted to the arbitrator to ascertain the amount due in accordance with this opinion of the court. If not agreed to by the 1st of April following, then a new trial was ordered with costs, to be paid by the appellants, the Great Western Company.

On the trial of the action it was shewn that Messrs. *Brydges* and *Reynolds*, as such managing and financial directors, had written to the bank asking for a credit of $100,000 on their D. & M. account, which, on the 1st April, 1858, was brought before and considered by the directors of the bank at a meeting of the Board held on that day, and on the same day their Cashier wrote accepting the proposal of Messrs. *Brydges* and *Reynolds*. *Held*, (affirming the judgment of the court below,) that the minutes of the board were properly admissible in evidence as part of the *res gestæ*. It was also shewn that the agent of the bank at Hamilton had sent to the head office a statement shewing how the account at his office with the Great Western Company was kept. *Held*, (also affirming the judgment of the court below,) that such statement was admissible as evidence in the cause.

The Great Western Railway Company, v. The Commercial Bank of Canada, 287.

[Affirmed on appeal to the Privy Council.]

COSTS.

Where the Court of Queen's Bench and Common Pleas had given opposing judgments on the same question, this court, on affirming one of those judgments, dismissed the appeal without costs.

Sexton v. Paxton, 219.

See also "Practice," 1.

CROWN.

(DEPUTY CLERK OF.)

Certificate signed by him for registry of judgment.

See "Registry of judgment."

DECREE.

(FORM OF, SETTING ASIDE DEED FOR FRAUD.)

See "Fraudulent Conveyance," 1.

DEFENCE AT LAW.

1. A defendant at law pleading a plea of payment, and either failing or neglecting to establish the plea, cannot afterwards set up the same facts as a defence to a bill in equity to enforce payment of the judgment at law.

Carpenter v. The Commercial Bank, 121.

2. An action at law having been brought upon a promissory note, and the defendant having pleaded that it had been given as collateral security for another debt, which had been paid, but adduced no evidence to establish this fact, was held precluded, in a suit afterwards instituted in the Court of Chancery to enforce the charge of the judgment against lands, from shewing any payment prior to the time of plea pleaded. [*Esten*, V. C., *dissentiente.*] *Ib.*

DESCRIPTION OF LAND.

In the year 1804, a patent from the Crown issued in the name of *James McGarvin*, for lot number twenty, in the first concession of the township of Chatham, containing 200 acres, more or less, and which was described as "commencing in front on the river Thames, at the north-east angle of the said lot, then north forty-five degrees west fifty-eight chains, more or less, *to within one chain* of the lands granted to *Hugh Holmes*," &c. In 1809, a survey of the lands was made, the plan of which shewed a road between the first and second concessions

fifty-eight chains from the river, which had never been opened however, and the lands remained in the same position as in the year 1792, when a description had been issued for this lot in the name of one *Watson* as running north sixty-seven and a half chains, more or less, to a post, containing 200 acres more or less, but no patent had ever been completed on such description. *McGarvin's* interest in this land was subsequently sold by the sheriff in 1811 under execution, and the conveyance was of lot number twenty, in the first concession, containing 200 acres, more or less; not expressing any metes or bounds. The deed to the plaintiff was made in 1843, and purported to convey the lot (number twenty) as containing 200 acres, "bounded in front by the river Thames; in the rear by the allowance for road between the first and second concessions," &c.

Held, reversing the judgment of the court below, that the plaintiff was restricted in his claim to land to a space of fifty-eight chains from the river Thames, and that he had no title upon which to found an action for trespass to lands to the north thereof, although the same were situate at a distance *greater* than *one chain* from the lands granted to *Holmes*. [*A. Wilson*, J., dissenting.]

Crow v. Martin, 425.

DORMANT EQUITIES.

See "Mortgage," &c., 4.

DOWER.

See "Marriage Settlement."
"Fraudulent Conveyance," 1,

ENGINEERS.

(APPOINTMENT OF, TO INSPECT WORKS.)

See "Agreement to accept works after inspection."

EQUITY OF REDEMPTION.

(SALE OF BY SHERIFF.)

See "Mortgage," &c., 1, 4.

ERROR.

(WHILE ISSUE OF FACT UNDISPOSED OF.)

See "Practice," 3.

ESTOPPEL.

See "Lessor and Lessee."
"Mortgagor and Mortgagee," 5.

EVIDENCE.

In an action by an executor for money lent and advanced by his testator, the evidence of indebtedness consisted of a receipt, signed by the testator, and found amongst his papers in the words following:—"*Received from my son S. G., the sum of forty-eight dollars for interest of* £300 *at four per cent. due the 1st day of May next, according to agreement, which I cannot find, so I have put the receipt on this paper.*" *Held*, affirming the judgment of the court below, that this was not admissible as evidence against the estate of S. G., the same not being an entry against the interest of the party making it.

Ganton v. Size, 368.

See also "Corporations."

EXAMINATION.

(OF DEFENDANT.)

See "Practice," 4.

FIXTURES.

See "Mortgage," &c., 3.

FRAUDULENT CONVEYANCE.

(SETTING ASIDE.)

1. In setting aside a deed for fraud, at the instance of a judgment creditor by a decree of the court, the proper form is to avoid the deed only as against the parties injured by the conveyance, and direct a sale of the property; the court will not simply set aside the deed and allow the judgment creditor to proceed and enforce his claim at law: and where the wife of the grantor joins in such a deed to bar her dower, it should be avoided only so far as it passes the estate and interest of the grantor: the creditor not being entitled to the benefit of such release of dower. In such a case what is properly the effect following from the release of dower, and to whose benefit it will enure?—*Quære.*

The Bank of Upper Canada v. Thomas 502.

2. Where a debtor conveyed away his estate, in fraud of creditors, to a person having a judgment against the debtor,

which conveyance was declared fraudulent and void against creditors, upon a bill filed at the instance of certain of the creditors: *held*, in this respect varying the decree of the court below, that the creditor, to whom the conveyance had been made, was not, under the circumstances, precluded from enforcing his judgment against the lands of the debtor, the conveyance of which had been so avoided.—[*VanKoughnet*, C., dissenting.] *Ib.*

HEIR AT LAW.

See "Lease with right of purchase."

INTERPLEADER ISSUE.

See "Assignment for benefit of Creditors," 2.

ISSUES OF FACT AND LAW.

See "Practice," 3.

JOINT ACTION.

Held, (affirming the judgment of the court below,) that where the holder of a bill of exchange or promissory note sues, under the statute, the drawers, acceptors and indorsers, in one action, he may discharge the drawers or indorsers [or accommodation acceptors] after an arrest under a *capias ad satisfaciendum*, without losing his remedies against the other defendants liable in priority to those discharged.

[*McLean* and *Draper*, C. JJ., dissenting.]

Holcomb v. Henderson, 230.

JOINT-TENANT.

(ADMISSIONS BY.)

Whether the admission of one joint-tenant or tenant-in-common, as to the extent of the interest held by him and his co-tenants, is admissible as evidence against his co-tenants: *Quære.*

Bernard v. Walker, 121.

JOINTURE.

See "Marriage Settlement."

JACQUES v. WORTHINGTON.

(7 GRANT, 192, COMMENTED ON, DISTINGUISHED FROM THE PRESENT CASE AND APPROVED OF.)

McQuesten v. Thompson, 167.

LACHES.

See "Specific Performance," 1.

LAW.

(DEFENCE AT.)

See "Defence at Law."

LEASE.

(WITH RIGHT OF PURCHASE.)

Held, affirming the decree of the Court of Chancery, that an assignment by the personal representative of a lessee for years, does not carry with it a right of purchasing the fee contained in the lease; but this court varied the decree, by directing the vendee of the personal representative to execute a mortgage upon the property, the conveyance of which he had obtained from the lessors as assignee of the lease.

Henrihan v. Gallagher, 338.

Sampson v. *McArthur*, (8 Grant, 72,) remarked upon and overruled, so far as the same decided that the right to purchase contained in a lease was personalty. *Ib.*

LESSOR AND LESSEE.

The owner of lands created a mortgage thereon in fee, and afterwards granted a lease of the same premises for twenty-one years, the lease being silent as to the existence of any incumbrance; and subsequently conveyed the premises to C. upon certain trusts, subject to the mortgage, which mortgage was afterwards assigned to P., who proceeded to a foreclosure and sale of the premises on default being made in payment, and the same were under a decree of the Court of Chancery sold, subject to the lease, and the fee therein was conveyed to the purchaser by a deed, duly executed by the owner of the equity of redemption, the assignee of the mortgage, and C. the grantee named in the trust deed; the purchaser, as part of the same transaction, giving to C. (the trustee) a mortgage securing part of the purchase money, which mortgage was subsequently discharged by certificate of payment duly registered. It appeared that the lessee for years had assigned his interest, and that

the same had been mortgaged to T. by assignment and not by sub-lease. The rent reserved by the lease having been allowed to run into arrear, during the existence of the mortgage from the purchaser under the decree to C., an action was brought therefor (after the discharge of the mortgage) in the name of C. against T. as assignee of the term.

Held, affirming the judgment of the court below, that T. was liable to pay this rent, notwithstanding he had never entered into possession of the premises; the effect of the conveyances being such that T. was estopped from disputing the right of C. as reversioner to enforce payment thereof. [*Esten*, V. C., dissenting.]

Todd v. Cameron, 434.

LE TARGE v. DE TUYLL.

(1 GRANT, 277, COMMENTED ON AND APPROVED OF.)

Bernard v. Walker, 121.

LEX LOCI REI SITÆ.

See "Marriage Settlement."

LIEN.

See "Registered Judgment," 3.

"Unpaid Purchase Money,"

LOWER CANADA.

(DEVISING LANDS IN.)

See "Will."

(STATUTE OF LIMITATIONS OF.)

An indorser of a promissory note, made, indorsed, and payable in Lower Canada, who was resident in Upper Canada, was sued there as such indorser, after a lapse of five years from the maturing of the note; the period prescribed as that within which an action must be instituted upon a note or bill of exchange in Lower Canada. *Held*, affirming the judgment of the court below, that the plaintiff was not entitled to recover; the lapse of time under the statute operating as an extinguishment of the debt, without suit, not as a bar to the remedy only.

Shiriff v. Holcomb, 516.

MALICE.

See "Slander."

MARRIAGE SETTLEMENT.

By a marriage contract executed in Lower Canada, the intended wife, in consideration of certain provisions made therein for her separate benefit, agreed to renounce her dower in the lands of her intended husband, either "*customary, prefix, or stipulated*," no mention being made of lands in Upper Canada. *Held*, that this did not preclude her from claiming dower out of lands in Upper Canada, held by her husband during the coverture; and that notwithstanding the contract which was entered into would form a first charge on all the property which the husband held at the time of the contract, or which might be afterwards acquired by him.

[*VanKoughnet*, C., dissenting.]

Jamieson v. Fisher, 242.

MILL.

(LESSEE OF.)

See "Pleading," 1.

MISDIRECTION.

See "Corporations."

MORTGAGE—MORTGAGOR—MORTGAGEE.

Held, reversing the decree of the court below, that the provision in the statute 12 Vic., ch. 73, sec. 1, (Consol. Stats. of U. C., ch. 22, sec. 357,) which authorizes the sale under execution of an equity of redemption, applies only where the execution is against the mortgagor himself, and on an execution issued against his lands.—[*Esten*, V. C. dissenting.]

The Bank of Upper Canada v. Brough, 95.

2. T. and B. being sureties for W. for the due payment of certain moneys to the City of Toronto, obtained from him a mortgage with a power of sale by way of indemnity; afterwards, having been obliged to pay certain money to the city, and being also liable to pay other sums on his account, they obtained from him an absolute deed for the nominal consideration of £1000; in fact no money was paid, nor did any accounting between the parties take place. Subsequently the holder of a prior mortgage instituted proceedings to foreclose, and on an application to extend the time for payment, T. made

affidavit that the application was made as well on behalf of the mortgagor as on behalf of himself and B., and it was also shewn that when the deed was signed T. stated that W. would retain his right to redeem, the object of the conveyance being merely to enable T. and B. to raise money to pay off the mortgagee, who was pressing, and other demands. On a bill filed by W. against B. and the representatives of T., (who had died in the meantime,) alleging the transaction to have been by way of security only, and praying to be allowed to redeem, a decree was made as prayed, which on appeal was affirmed, notwithstanding the surviving grantee in the deed (B.) swore that the conveyance had been made by W. for the purpose of absolutely releasing his interest in the lands conveyed.—[*Draper*, C. J., dissenting.]

Bernard v. Walker, 121.

3. T., K. & Co., carrying on business as gas-fitters and plumbers, contracted verbally with D., an hotel-keeper, to supply a new hotel he was erecting with various articles in the way of their trade, which were to be paid for as the work progressed. D. afterwards left this province on account of ill health, having previously executed a power of attorney to one S., authorizing him to carry on his business during his absence. T. K., & Co., having discovered that D.'s estate was greatly involved, refused to proceed with their contract, unless secured for their work and materials, whereupon S., with a view of inducing T., K. & Co. to complete their contract, in pursuance of a previous arrangement, executed, as such attorney, a chattel mortgage of the goods furnished by them, securing to T., K. & Co. payment of their demand. At the time of the execution of this instrument D. was dead, but this fact was not known to the parties until some time after the completion of the work. *Held*, reversing the decree of the court below, that T., K. & Co. were not, under this mortgage, entitled to remove any of the fittings put in the hotel; their only remedy being for the price of their work and material under their contract with D.

Jacques v. *Worthington*, 7 Grant, 192, commented on, distinguished from the present case, and approved of.

McQuesten v. Thompson, 167.

4. In April 1830, A. the owner of real estate being indebted to B. in the sum of £121, and unable to pay the same, procured two sureties to join him in a bond for the amount of his indebtedness, and as an indemnity to them conveyed several valuable lots of land by a deed absolute in form taking back a bond of defeasance. Ten days afterwards one of the sureties delivered to B. a promissory note of two other persons for about one-half the debt and interest, and in May of the following year, A. being still unable to pay, and his sureties desiring

to be relieved from liability, it was arranged between A. and B. that A. should convey certain of the lands, which had been so transferred to the sureties to B., which was accordingly done by an absolute deed of coveyance, and the bond cancelled: B. at the time giving back a memorandum signed by himself as follows: "Received of Mr. *A. McDonell* lands as follows," (enumerating them, part being cultivated, the rest waste lands) "for the sum of one hundred and twenty-six pounds five shillings;" (this amount being the original debt and interest) "should he want the above property I should have no objection to giving it back, if Mr. *A. McDonell* would pay me the above sum in three instalments, viz.," (setting out the several instalments,) "with interest from this date." A. was then in possession and occupation of the cultivated lands, and also in possession of the wild lands, and so continued until 1848, when B. instituted proceedings in ejectment to obtain possession of the cultivated lands, in which action he obtained possession in 1849. About the same time (1849) other creditors of A. had obtained judgment and execution against him under which his interest in these lands was sold in 1850, and purchased by B. through an agent. In the books of B. (for the year 1849) entries were found charging A. with interest on the amount from 1831 to 1849. B. never gave credit for the amount of the promissory note received by him, nor did he produce it or account for it in any way. In 1860 a bill was filed by A. claiming a right to redeem, and a decree for redemption was made. On an appeal from the court below,

Held, (*Draper* and *Richards*, C.JJ. and *Morrison*, J., dissenting) affirming the decree of the court below, first, that, under the circumstances stated, the deed to B., together with the memorandum signed by him, operated as a mortgage security only.

Second, that the circumstances appearing were such as did not warrant the court in its discretion in refusing redemption under the provisions of the eleventh clause of the Chancery Act.

Third, following *McCabe* v. *Thompson*, 6 *Grant*, 175, that the security to B. having been created by a deed absolute in form, the right or interest of A. therein was not saleable by the Sheriff under common law process.

Fourth, that the Dormant Equities Act did apply, and

Fifth, that under the circumstances the lapse of twenty years since the time appointed for payment did not bar A.'s right to redeem.

McDonald v. McDonell, 393.

5. The owner of real estate created a mortgage thereon, and afterwards sold and conveyed a portion of the property by a deed containing absolute covenants for quiet enjoyment, freedom from incumbrances, &c., taking from the purchaser a bond

conditioned for the payment of a proportionate amount of the mortgage debt. *Held*, reversing the judgment of the court below, that the fact of the purchaser holding such absolute conveyance was not such a representation to the holders of the mortgage as warranted them in executing to the purchaser a release of his portion of the estate from the mortgage, and afterwards looking to the mortgagor for payment thereof.—[*VanKoughnet*, C., dissenting.]

Bank of Montreal v. Hopkins, 408.

See also "Lessor and Lessee."
"Registry of Judgment," 2.

MUNICIPAL LOAN FUND ACT.

(ADVANCES UNDER.)

Where a township municipality advanced a sum of money to a railway company, under the provisions of the Consolidated Municipal Loan Fund Act, and some of the stockholders of the company were afterwards released from their liability by an act of the legislature, passed nearly eighteen months after the works on the road were stopped for want of funds, and new companies were formed under that and subsequent acts of the legislature, which released the new corporations from the construction of the original line of road, until a new line had been constructed, and it appeared that there was no immediate prospect of such a result. *Held*, reversing the judgment of the court below, that the municipality was not released from their liability to the Crown. (*Spragge*, V.C., *dissentiente*.)

Norwich v. The Attorney General, 541.

McCABE v. THOMPSON.

(6 GRANT, 175, FOLLOWED.)

McDonald v. McDonell, 393.

NEW TRIAL.

See "Corporations."

NOTICE.

Courts of equity cannot, any more than courts of law, on the footing of want of notice of the illegality, give effect to proceedings which, on principles of the common law and under acts of parliament, are utterly void.

Gardiner v. Juson, 188.

See also "Constructive Notice."

NON DIRECTION.

See "Corporations."

NON OBSTANTE VEREDICTO.

See "Pleading," 2.

PAROL EVIDENCE.

The principle upon which parol evidence will be received to cut down a deed absolute on its face to a mere security considered and acted on.

Bernard v. Walker, 121.

Le Targe v. *De Tuyll*, 1 Grant, 277, commented on and approved of. *Ib.*

PARTNERSHIP.

A. and C., a trading partnership, entered into a joint speculation with C. & D. for the purchase and sale of lands; afterwards E. was admitted into the concern upon the understanding that each should be entitled to one-fourth of the profits, and liable in the same proportion to any losses incurred. For the purpose of carrying on the business of the co-partnership, the parties were in the habit of discounting notes which were made by E., and indorsed by A. and B. and C. and D. in their individual names. After the partnership had been in operation for nearly three years C. wrote to A. and B. and E. proposing to retire from the concern on receiving a certain amount in lands taken at a valuation, he agreeing for a certain period to continue to indorse renewals of the notes of the firm then outstanding, as accommodation indorser, which proposal was communicated to D., but nothing further was done with regard to it. Shortly afterwards D. made a similar proposition to A. and B. and E. on their "assuming all my share of the liabilities incurred by or for the said company, excepting only my liability for 12 or 15 months as accommodation indorser after Mr. Knowlson [C] on the paper in the Bank of Upper Canada," which proposal was accepted by A. and B. and E. Subsequently both C. and D. by a joint memorandum formally relinquished their interests in the company, but it did not appear that D.'s stipulation as to indorsing the notes was ever communicated to C. The notes so indorsed by C. and D. had been all consolidated into one note of £3,200, and upon a renewal of this note an action was subsequently brought against all the parties thereto, and a sale of D.'s lands was effected under the execution issued in that action, which realized only a portion of the amount. Thereupon D. filed a bill against C. seeking to make him, as prior indorser, pay the amount still remaining due in respect of the judgment, to re-

imburse D. what his lands had sold for, and also to make up the loss sustained by him in consequence of the sale of his lands at, as was alleged, a great undervalue. Under the circumstances of the case the court below treated C. and D. as co-sureties for the continuing partners, and as such liable only to make up the amount of the claim in equal proportions; and it appearing that C. had already paid more than his moiety of the demand, ordered D. to repay the excess to him, together with the costs of the suit, which on an appeal to this court was affirmed and the appeal dismissed with costs.

Per Esten, V. C.—Prior to the General Orders of 1853, (Rule 8, Order VI.,) it would have been necessary to make the continuing partners parties to such a bill unless it were shewn that they were insolvent: in which case that would afford a sufficient reason for not making them parties.

Harper v. Knowlson, 253.

PART PERFORMANCE.

See "Specific Performance."

PAYMENT.

(PLEA OF.)

See "Defence at Law."

PERSONAL REPRESENTATIVE.

See "Lease with right of purchase."

PLEADING.

1. The lessee of a mill situate near a river and driven by water drawn in a channel from it, sued for damages sustained by him by reason of the obstruction of the flow of the stream caused by the defendant throwing slabs and other waste stuff into the stream, and thereby obstructing the flow of water into the channel aforesaid. The lessor of the plaintiff was the owner of the land adjoining the stream, and also of the land surrounding the pond used for the working of the mill.

Held, affirming the judgment of the court below, that the lessee had a right to maintain such action; and that the declaration stating the plaintiff to be possessed of land and premises *near to* the river, and as such entitled to the use of the stream for the working of his mill, was sufficient.

Dickson v. Austin, 373.

2. In an action by a principal against his agent, for neglect in insuring his property (a stock of goods) in such a manner

that, a loss occurring, the insurance company, on being sued for the amount of insurance, obtained a verdict on the ground that the goods had been insured at an over-value, the declaration alleged the value to be $3,000, to which the defendant, amongst other pleas, pleaded that plaintiff had not, at the time of making application to insure, nor at any time thereafter, goods in his store to the value of $3,000, and the jury found for the defendant on these pleas. *Held*, reversing the judgment of the court below, that the traverse of value in the declaration was an immaterial traverse, and that plaintiff was entitled to judgment *non obstante veredicto*.

McGuffin v. Ryall, 415.

PRACTICE.

1. The right of appeal from Chancery is confined to orders or decrees made in a cause pending between parties; where, therefore, an appeal was made to this court from an order directing the taxation of a solicitor's bill against his client in a particular mode, the court dismissed the appeal with costs.

In re Freeman, Cragie and Proudfoot, 109.

2. The respondent, although he may, is not bound in such a case to move at an earlier stage to quash the proceedings. *Ib.*

3. The plaintiffs demurred to one plea pleaded, and took issue on another; and the demurrer, on argument, having been overruled, the plaintiffs entered judgment against the demurrer, and before the issue in fact was tried brought error, which was quashed, on the ground that until the issue in fact was disposed of, error could not be sustained.

Dickson v. Ward, 275.

4. *Held*, affirming the judgment of the court below, that in proceeding to arrest and imprison a party for the insufficiency of his answers on an examination as to his estate and effects, conducted before any other functionary than the judge who orders the arrest, it is necessary that a summons to shew cause should, in the first instance, be issued. *Also*, affirming the same judgment, that the fact of the judge who made the order to commit having authority to make such order, and that the same appeared to be regular on the face of it, was not a sufficient justification for the attorney of the party suing out such order in an action brought against the attorney and his clients for assault and false imprisonment.

Ponton v. Bullen, 379.

5. Where defendants appealed jointly, and the court thought that all of them except one were entitled to be relieved from the decree which had been pronounced in the court below, the court reversed the decree, notwithstanding that as to one of the appellants the evidence was sufficient to establish the will under which the plaintiff claimed to be entitled to the estate in question. Black v. Black, 419.

PREFERRED CREDITORS.

See "Assignment for benefit of Creditors," 1.

PRIVILEGED COMMUNICATIONS.

See "Slander."

PROMISSORY NOTE.

(MADE AND INDORSED IN LOWER CANADA—SUED ON IN UPPER CANADA.)

See "Lower Canada Statute of Limitations."

PURCHASE FOR VALUE WITHOUT NOTICE.

The doctrine of constructive notice, and the defence of purchase for value, as applicable to this country, commented on.

Smith v. Graves, 9.

RAILWAY STOCKHOLDERS.

(DISCHARGE OF, BY ACT OF PARLIAMENT.)

See "Municipal Loan Fund Act."

REGISTERED JUDGMENT.

1. A certificate of the entry of judgment, signed by the deputy-clerk of the Crown, held sufficient for the purposes of registering such judgment under the statute.

Gardiner v. Juson, 188.

[Since this case was decided the act for the registering of judgments has been repealed.]

2. A., on the 2nd of February, 1857, created a mortgage of real estate in favour of B., which was duly registered on the 11th of July following. B., by an indorsement on the mortgage, assigned the same to C.; subsequently a judgment was recovered against B., which was duly registered, after which C. registered the assignment of mortgage to himself. *Held*, affirming the judgment of the court below, that the judgment by reason of such prior registration, had priority over the assignment to C., which, by reason of such non-registration, was void as against the judgment creditor.

Freeman v. The Bank of Upper Canada, 362.

3. *Held, per Curiam*, affirming the judgment of the court below, that in order to a judgment creditor retaining the lien created by the registration of his judgment it was incumbent on him to lodge a writ against lands with the sheriff within one

year after the registration of his judgment; in other words, if such a judgment creditor had neglected to lodge his writ against lands for a year after the entry of his judgment, and an unregistered judgment creditor or a subsequently registered judgment creditor had lodged his writ before him, the sale effected under such execution will be freed and discharged of any lien created by such registered judgment.

[*VanKoughnet*, C. dissenting.]

Kerr v. Amsden, 446.

REGISTRATION.

Held, reversing the judgment of the court below, that when the memorial follows the description, which in the deed itself is sufficient, registration thereof is effectual.

Reid v. Whitehead, 580.

REDEMPTION.

(RIGHT OF, AFTER TWENTY YEARS.)

See "Mortgage" &c., 4, 5.

RELEASE.

(POWER OF DEBTOR TO INSIST ON BY CREDITORS.)

See "Assignment for benefit of Creditors," 1.

RENT.

(LIABILITY OF MORTGAGEE OF TERM TO PAY.)

See "Lessor and Lesee."

REPRESENTATION.

(AFFECTING THIRD PARTIES.)

See Mortgagor and Mortgagee," 5.

RES GESTÆ.

See "Corporations."

RIPARIAN PROPRIETOR.

See "Pleading," 1.

SALE FOR TAXES.

See "Taxes."

SALE BY SHERIFF.

(SET ASIDE IN EQUITY AT INSTANCE OF ANOTHER JUDGMENT CREDITOR.)

A *fi. fa.* lands having been lodged in the sheriff's office, was allowed to expire without any thing being done under it, either by seizing or offering for sale the lands of the debtor. Afterwards, a new sheriff being appointed, this with other process was handed over to him; and he proceeded formally to offer for sale the lands of the execution debtor, and made a return of "lands on hands for want of buyers;" whereupon the plaintiff sued out a *venditioni exponas* and *fi. fa.* residue, under which the lands which had been previously offered for sale were sold, and a conveyance thereof made by the sheriff.

Upon a bill filed by another judgment creditor, the court below set aside this sale, and ordered the deed to be cancelled; the *ven. ex.* and *fi. fa.* residue being, under the circumstances, absolutely void; which decree was affirmed on appeal.

Gardiner v. Juson, 188.

SEDUCTION.

In an action for the seduction of the daughter of the plaintiff, the action may be maintained before the birth of the child; and,

Per Curiam, the statute (7 Wm. IV ch 8, Con. Stat. U. C. ch. 77) does not dispense with evidence of a pecuniary loss or damage, such as was required before the act.—[*Spragge*, V.C., and *Adam Wilson*, J., dissenting.]

Westacott v. Powell, 525.

SLANDER.

In actions for slander or libel it is the province of the judge to determine whether the occasion of uttering the slanderous words, or writing the libelous matter complained of, was or not privileged, and if privileged, *held*, reversing the judgment of the court below, that in the absence of evidence of malice, there is nothing to be left to the jury as to *bonâ fides* or otherwise.

McIntee v. McCulloch, 390.

SPECIFIC PERFORMANCE.

1. In the year 1850, the owner of 100 acres of land, with the view as was admitted of retaining his son upon the property and settling him in life, agreed to convey to him in fee simple 50 acres of this land, worth at least £150, upon payment of £50, payable in six years without interest, and executed a

bond for that purpose. After obtaining this bond, the son went to work about the country, and resided some years at a distant part of the province, sometimes returning when out of employment and residing with the other members of his father's family, and during such residence was in the habit of assisting in doing the usual work of the farm. Nothing was ever paid on account of the purchase money, although it was alleged the son was entitled to a credit on account thereof for services rendered. After the lapse of a period of about ten years a bill was filed by the son to enforce a specific performance of the contract evidenced by the bond, and a decree was pronounced in favour of the plaintiff. Upon an appeal to this court this decree was reversed, and the bill in the court below dismissed with costs, unless the plaintiff should within one month deliver up the bond to be cancelled; in that event the dismissal to be without costs.

[*Draper*, C. J., and *Esten*, V. C., dissenting.]

Evans v. Evans, 156.

2. The owner of real estate, who was old and enfeebled, had, for the purpose of inducing his son to relinquish his own farm and come and reside with, and take care of the father during his life, promised the son to give him the farm upon which he (the father) was residing, and the son subsequently removed with his family to reside with the father. After remaining in the house for a few days, the son's wife and family, during his temporary absence, removed from the house of the father in consequence of disagreements with him, and before the son returned the father died. It was alleged that the father had made a will devising the property, but after his death no trace of any will could be discovered, nor was there any satisfactory account given of it. A witness to the alleged will gave evidence of its execution by the testator, but it was not shewn that there had been a second witness to it, nor were its provisions shewn; under these circumstances, *held*, reversing the decree of the court below, that there was not such an act of part performance as would take the case out of the Statute of Frauds.

Black v. Black, 419.

SURVEY.

(EFFECT OF, ON LANDS GRANTED BEFORE THE DATE THEREOF.)

See "Description of land."

TAXES—SALE FOR.

Held, affirming the judgment of the court below, that the provision of the statute 16 Vic., ch. 182, secs. 55 and 56, Con.

Stat. of Upper Canada, chap. 55, requiring the county treasurer in the warrant issued by him for the sale of lands in arrear for taxes, to distinguish those that have been patented, from those under lease or license of occupation, is compulsory; and that sales effected under a warrant omitting such particulars are void.

Hall v. Hill, 569.

TENANT IN COMMON.

(ADMISSIONS BY.)

See "Joint Tenant."

TRUSTEE AND CESTUI QUE TRUST.

See "Attorney and Client."

ULTRA VIRES.

See "Corporations."

UNPAID PURCHASE MONEY.

(VENDOR'S LIEN FOR.)

The purchaser of land from the Crown sold and transferred his right to C. in 1834. C. subsequently transferred his interest to T. H., who entered into possession, and remained in such possession until 1839, when he died, leaving an infant son his heir-at-law. About a year after his death his widow assumed to sell the estate to E. H., a brother of her late husband, who entered into possession; and having subsequently procured, from the original vendee of the Crown, an assignment of the same date and in the same words as the one executed by him to C., by means thereof procured from the Crown the patent for the lot in his own name, and mortgaged the property to his brother H. H, who had notice of all the circumstances attending the title, and to whom E. H. afterwards released his equity of redemption. In the spring of 1861 H. H., by means of an ejectment, evicted E. H., who up to that time had continued in possession of the property, and in November of that year H. H. sold and conveyed the estate to S., who took without notice, and paid the whole of his purchase money except £175, for which sum the father of S. gave his promissory note for the purpose of facilitating the carrying out of the bargain, S. leaving in the hands of his father certain securities, out of which it was agreed that the father should collect means over and above a sum owing by the father to S. to retire the note, which note, however, was not paid in full,

£75 being still due thereon. In 1863 a bill was filed by the heir-at-law of T. H., claiming under the circumstances to be entitled to the estate, and to set the sale to S. aside, which was decreed on the ground that the purchase money had not been paid, so as to entitle the purchaser to plead a purchase for value without notice.

On appeal this decree was reversed, and the bill in the court below ordered to be dismissed with costs. [*VanKoughnet*, C., and *Spragge*, V. C., dissenting.]

Harvey v. Smith, 480.

UNPATENTED LANDS.

See "Wild Land Assessment."

VENDITIONI EXPONAS.

(ISSUED ON RETURN OF SPENT WRIT.)

WARRANT (TREASURER'S.)

See "Taxes—Sale for."

WILD LAND ASSESSMENT.

Held, affirming the judgment of the court below, that unpatented lands, though held by purchasers from the Crown who had paid a part of the price therefor, were not liable to assessment, although purchased from the Crown after June, 1853. [*Esten*, V. C., *dubitante*.]

The Corporation of the County of Simcoe v. Street, 211.

See also "Voluntary Payment."

WILL—CONSTRUCTION OF.

A married woman, domiciled in Upper Canada, on the 17th December, 1828, made her will, the second paragraph of which was as follows: "I give, devise, and bequeath my house and property in St. Paul street, Montreal, left me by my former husband, *Michael Trudeau*, to my son *Allan*, with power to give an equal share to his sisters *Helen*, *Catherine* and *Harriet*, and to his brother *John*," and died shortly after the making of this will. On the 20th of March, 1842, her husband made and published his last will and testament, by the fourth and fifth clauses of which he devised lot No. 37 (the premises in question) to his son *John Watson Macdonell*, and lot No. 32 to his son *Alexander Roderick Macdonell*. By the 14th clause, he gave to his son *Allan* his watch, gold seal and gold ring. In a

subsequent part of the same will (para. 16) he directed, that should *John Watson Macdonell* prefer to take possession of lot No. 32, then lot No. 37 was to become vested in *Alexander Roderick*, the same as if it had been willed to him. By a codicil to this will, dated on the 1st of April following, the testator declared his will and desire to be that his son *Allan* should take holy orders, but should *Allan's* health or any other reasonable cause or circumstances cause him not to enter into holy orders, he ordered and devised that *Allan* should have to himself, and his heirs for ever, the whole of the said lot No. 37, in which case *John Watson* and *Alexander Roderick* were ordered to receive certain other lands particularly mentioned, adding in a subsequent clause of the codicil, "*But should my son Allan not divide or give over in full an equal portion of the house in St. Paul street, Montreal, as was his mother's intention, as appears by her last will, in which case I order and devise, that my son Allan shall only receive of my property what has been willed to him in my last will, before this will was written, then this codicil to be null and void; otherwise to remain in full force and virtue.*" After the death of the testator, *Allan*, not having taken holy orders, entered into possession of No. 37, and also into the receipt of the rents and profits of the property in Montreal devised by his mother, treating it as his own absolutely, never having made any conveyance of any portion thereof or paid any share of the rents and profits to his sisters and brother, and having also executed a mortgage thereon, as owner in fee, for his own benefit. *John Watson Macdonell* had after his father's death chosen to take as his share lot No. 32, and thereupon *Alexander Roderick Macdonell*, claiming that under the terms of the codicil he had become absolutely entitled to lot 37, brought ejectment therefor. It was shewn that by the law of Lower Canada, the words of the will of Mrs. *Macdonell* vested in the sisters and brother absolute interests in the property in Montreal, and that no conveyance or assignment by *Allan Macdonell* was necessary to vest their portions of the estate in them.

Held, reversing the judgment of the court below, that the event upon which the estate was to become divested from *Allan* and to devolve upon the plaintiff had not happened: or, in other words, that the condition upon which *Allan* held the estate had not been broken.

[*Esten*, V. C., dissenting.]

McDonald v. McDonell, 343.